

COMMENTS

SUCCESSOR LIABILITY UNDER CERCLA: IT'S TIME TO FULLY EMBRACE STATE LAW

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The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹ is the primary federal remedial statute governing hazardous waste contamination sites. In the most publicly recognizable feature of the statute, the federal government funds cleanup of hazardous waste sites through the Superfund program.² But, CERCLA also imposes liability for cleanup and associated costs on parties found responsible for hazardous waste releases.³

The assignment of preexisting CERCLA liability from one party to another is of the utmost importance for corporations and other business entities. This Comment addresses a circuit split that has developed over the rules governing the successor liability of a corporation that purchases the assets of another firm that is liable under CERCLA for hazardous waste contamination. Ultimately, Supreme Court precedent and general conflict of laws principles require that asset purchasers be held liable as successors to parties liable under CERCLA only if the law of the state containing the hazardous release site so provides.

Part I of this Comment outlines the general statutory scheme of CERCLA. As noted above, CERCLA imposes private liability on parties responsible for hazardous waste releases. At the same time, Congress recognized that private responsible parties will not always be

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¹ 42 U.S.C. §§ 9601–9675 (2000).

² See 42 U.S.C. § 9611 (2000) (authorizing use of funds from the Superfund created under 26 U.S.C. § 9507 (2000)).

³ See 42 U.S.C. § 9607 (2000) (imposing private CERCLA liability on specified parties).

identifiable, and thus created the Superfund to pay for federal cleanup of such sites.

Additionally, Part I demonstrates the economic importance of successor liability under CERCLA. In total, private parties have paid nearly \$24 billion under CERCLA for remedial activities, which suggests the high stakes a corporation faces if found liable as a successor to a responsible party.⁴ Moreover, changes in federal funding for CERCLA imply that private liability will become even more important as a funding source for CERCLA cleanups. Special industry taxes designed to replenish the Superfund trust were allowed to expire in 1995, and by 2004 federal funding for CERCLA cleanups was limited to money appropriated from the general budget.⁵

Part II describes successor liability law and its application to CERCLA. CERCLA does not explicitly extend liability to the corporate successors of parties that face existing private liability. However, as a matter of statutory construction, the courts of appeals that have addressed the question have unanimously held that CERCLA liability can extend to successors of responsible parties.⁶

Given the unanimous conclusion that CERCLA liability can extend to successors of responsible parties, combined with the absence of any rules for successor liability within the text of CERCLA, the federal courts must engage in federal common law rulemaking⁷ to determine the scope of CERCLA successor liability.⁸ As a matter of fed-

⁴ U.S. EPA, Superfund's 25th Anniversary: Capturing the Past, Charting the Future, <http://www.epa.gov/superfund/25anniversary> (last visited Jan. 20, 2008).

⁵ JONATHAN L. RAMSEUR & MARK REISCH, LIBRARY OF CONG., SUPERFUND: OVERVIEW AND SELECTED ISSUES 11 (2006).

⁶ See, e.g., *United States v. Gen. Battery Corp.*, 423 F.3d 294, 298 n.3 (3d Cir. 2005).

⁷ The federal courts may not create general federal common law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). However, as a practical matter, the federal courts create common law rules in a variety of circumstances. Generally, modern federal common law refers "to federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands." RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 685 (5th ed. 2003). When creating rules of decision through a common law process, the federal courts may either (1) adopt state law as the federal rule or (2) judicially create a federal rule.

⁸ See generally FALLON ET AL., *supra* note 7, at 693-704 (describing the circumstances under which federal common law-making may be appropriate). In the context of successor liability under CERCLA, the creation of rules of decision by a common law-like process in the federal courts may be justified as "the normal judicial filling of statutory interstices." *Id.* at 693 (quoting Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964)).

eral common law, the courts of appeals have held—in recognition of a universal rule of corporate law—that asset purchasers are not generally liable as corporate successors.⁹ However, there are four widely recognized equitable exceptions to this general rule: (1) assumption of liability, (2) de facto merger, (3) fraud, and (4) mere continuation.¹⁰ Additionally, a minority of states have also recognized two broader exceptions to asset purchaser nonliability: the product line and the substantial continuity exceptions.¹¹

In fashioning federal common law rules of decision regarding the applicability under CERCLA of the various exceptions to asset purchaser nonliability, the courts of appeals are split over whether the adoption of state law or the judicial creation of a federal rule is appropriate.¹² In *United States v. Kimbell Foods, Inc.* and its progeny, the Supreme Court developed a general framework to determine whether federal courts engaged in federal common law rulemaking (in the context of statutory gap-filling) should incorporate state law or judicially create a rule “according to their own standards.”¹³ According to

⁹ See *Gen. Battery Corp.*, 423 F.3d at 305 (“The general rule of corporate successorship . . . is nonliability for acquiring corporations . . .”). Note that a corporation that engages in a statutory merger or consolidation with a responsible party generally assumes successor CERCLA liability.

¹⁰ See Lawrence P. Schnapf, *CERCLA and the Substantial Continuity Test: A Unifying Proposal for Imposing CERCLA Liability on Asset Purchasers*, 4 ENVTL. LAW. 435, 443-48 (1998) (describing these “traditional” exceptions to asset purchaser nonliability).

¹¹ *Id.* at 448-54.

¹² Compare *Gen. Battery Corp.*, 423 F.3d at 305 (creating a federal rule to determine CERCLA successor liability), *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992) (same), and *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 487 n.9 (8th Cir. 1992) (same), with *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001) (holding that state law provides the rules of decision for the federal common law of CERCLA successor liability), *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501 (11th Cir. 1996) (same), *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994) (same), and *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245 (6th Cir. 1991) (same). See generally *New York v. Nat'l Serv. Indus. (Nat'l Serv. Indus. II)*, 460 F.3d 201, 207-09 (2d Cir. 2006) (hypothesizing that state law should apply but noting that no conflict existed for the case at hand); *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 363-64 (9th Cir. 1998) (deciding that recent Supreme Court cases favor the application of state law, but not deciding the issue), *N. Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 650-51 (7th Cir. 1998) (noting a circuit split but reserving the issue). Recently, the Eighth Circuit has questioned its creation of a federal “substantial continuity” rule in *Mexico Feed & Seed Co.* See *K.C.1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1021-22 (8th Cir. 2007) (noting that the Supreme Court decision in *United States v. Bestfoods*, 524 U.S. 51 (1998), may have undermined *Mexico Feed & Seed Co.*, but declining to overrule it).

¹³ 440 U.S. 715, 727 (1979) (internal quotation marks omitted) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)). Even if the *Kimbell Foods*

Kimbell Foods, the federal courts should create their own rule if (1) the federal program "must be uniform in character throughout the Nation," (2) "application of state law would frustrate specific objectives" of the federal program, and (3) application of a federal rule would not "disrupt commercial relationships predicated on state law."¹⁴

As Part II makes clear, resolution of the second and third *Kimbell Foods* factors requires analysis of the law of the specific state(s) involved in the hazardous waste release.¹⁵ However, in many cases the asset purchaser may be incorporated in a state different than the state in which the hazardous release occurred.¹⁶ While few federal courts have even addressed this issue, those that have disagree over whether the state of incorporation or the state of the hazardous release site should provide the applicable exceptions to the general rule of nonliability for asset purchasers.¹⁷ Similarly, legal commentators have also failed to identify the appropriate state law.¹⁸

Parts III and IV of this Comment attempt to resolve the conflict of laws underlying the instant circuit split. Although counterintuitive, the *Kimbell Foods* federal-versus-state-law analysis can only be conducted after a court has identified the appropriate state law. Thus,

analysis suggests that a federal court should adopt state law as the rule of decision, the issue remains one of federal law. See *id.* at 729 (holding that "when there is little need for a nationally uniform body of law, state law may be incorporated as the *federal* rule of decision" (emphasis added)); see also FALLON ET AL., *supra* note 7, at 701 (noting that *Kimbell Foods* employs a "two-step formulation,"—"federal law governs, but it incorporates state law").

¹⁴ *Kimbell Foods*, 440 U.S. at 728-29 (internal quotation marks omitted) (quoting, in part, *United States v. Yazell*, 382 U.S. 341, 354 (1966)).

¹⁵ See *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991) ("[F]ederal courts should incorporate state law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute." (emphasis omitted)).

¹⁶ For example, a Pennsylvania corporation may be responsible for a release of hazardous wastes in Michigan. See *generally* *Chrysler Corp. v. Ford Motor Co.*, 972 F. Supp. 1097, 1103 (E.D. Mich. 1997).

¹⁷ Compare *City Mgmt. Corp.*, 43 F.3d at 250 (applying the law of the state of incorporation), *Anspec Co.*, 922 F.2d at 1248 (same), and *United States v. Distler*, 865 F. Supp. 398, 401 (W.D. Ky. 1991) (same), with *Chrysler Corp.*, 972 F. Supp. at 1103 (applying the law of the state of the hazardous release, rather than the law of the state of incorporation of the successor), and *United States v. Vt. Am. Corp.*, 871 F. Supp. 318, 320 (W.D. Mich. 1994) (same).

¹⁸ See, e.g., David E. Dopf, Casenote, *Federal Common Law or State Law?: The Ninth Circuit Takes on Successor Liability Under CERCLA in Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 10 VILL. ENVTL. L.J. 171, 190-96 (1999) (arguing that CERCLA should incorporate state successor liability law but failing to consider the choice of law question that arises if the state of incorporation and the state of release differ).

Part III answers the preliminary conflict of whether—when the asset purchaser is a corporation foreign to the state in which the release occurred—the law of the state of incorporation or the state of release governs. Under general conflict of laws principles, the law of the state containing the hazardous waste site should generally govern. In most cases, that state will bear the most significant relationship to, and hold the most significant interest in, the occurrence at issue.

Finally, applying *Kimbell Foods* and its progeny, Part IV argues that the federal common law rules of decision for CERCLA liability of an asset purchaser should incorporate state law. Neither side in the current circuit split has adequately applied these precedents. The circuits that have judicially created federal rules to govern successor liability under CERCLA have failed to heed Supreme Court doctrine that requires the presence of a significant conflict between federal policy and incorporation of state law before a federal court may create its own rules to fill a statutory gap.¹⁹ While other circuits have appropriately incorporated state successor liability rules into the federal common law of CERCLA successor liability, these courts have often failed—as Supreme Court precedent requires—to apply those rules as they have developed in the particular state at issue.

Turning explicitly to the *Kimbell Foods* analysis, Part IV demonstrates that the national uniformity and state law commercial relationship factors provide, at most, ambiguous support for federal courts to create their own rules of decision in this instance. Moreover, Supreme Court cases subsequent to *Kimbell Foods* have argued that cases for which the federal courts should create a rule are “‘few and restricted,’ limited to situations where there is a ‘significant conflict between some federal policy or interest and the use of state law.’”²⁰

Thus, the second *Kimbell Foods* factor—whether application of state law would frustrate the federal program—assumes primary significance. As Part IV demonstrates, there is no clear conflict (to say nothing of a “significant conflict”) between use of state law and the purposes or operation of CERCLA. Given the absence of strong support for judicially created federal rules of decision from the other two *Kimbell Foods* factors, coupled with the absence of a significant conflict between federal policy and state law, the law of the state in which the

¹⁹ See *Atherton v. FDIC*, 519 U.S. 213, 218 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994).

²⁰ *O'Melveny & Myers*, 512 U.S. at 87 (citation omitted) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963) and *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

hazardous release occurred should provide the rules of decision for CERCLA successor liability.

I. CERCLA

CERCLA's structure suggests that Congress intended to balance stringent private liability for hazardous waste releases with a recognition that a financially viable responsible party could not always be found. The resolution of these competing policies has major economic consequences for corporations and other business entities engaged in asset purchases.

A. CERCLA Policy

CERCLA combines strict liability for private parties responsible for hazardous waste releases with public funding for cleanup. Private liability is central to the CERCLA statutory scheme. It creates incentives for the prevention of hazardous waste releases in the first instance. It also creates incentives for private cleanup activities.²¹

Generally, a private party may face CERCLA liability if "there has been (1) a release or threatened release; (2) of hazardous substances; (3) from a facility or vessel; (4) that caused the incurrence of response costs . . . ; and (5) the defendant falls within one of the [four classes of potentially responsible parties (PRPs)]."²² PRPs are (1) current owners and operators of a facility at which hazardous wastes were disposed of, (2) former owners and operators of such a facility at the time of disposal, (3) generators of hazardous substances, and (4) transporters of hazardous substances.²³ The courts have generally held that CERCLA imposes joint and several liability for hazardous waste contamination caused by multiple responsible parties.²⁴

As the preceding elements demonstrate, CERCLA imposes strict liability on all responsible parties. For example, the current owner or operator of a facility may be liable for cleanup costs under CERCLA even if that entity did not contribute to the hazardous release. Note, however, that the statute does limit the classes of private parties that

²¹ See COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY 1981, at 99-101 (1981) (describing basic policy elements of CERCLA, including a preference for private party cleanup).

²² Schnapf, *supra* note 10, at 442-43 (footnotes omitted).

²³ 42 U.S.C. § 9607(a) (2000).

²⁴ RAMSEUR & REISCH, *supra* note 5, at 8.

may be held liable.²⁵ On the other hand, there is no statutory limit on damages under CERCLA.²⁶ Indeed, private parties have paid for about seventy percent of all long-term cleanup costs under CERCLA.²⁷

The federal government has paid for most of the remaining cleanup costs. Congress authorized the Hazardous Substances Superfund²⁸ and special industry tax revenues²⁹ to subsidize cleanup publicly. Federal funding has been directed primarily to so-called “orphan sites” for which no financially viable PRP can be identified.³⁰ Overall, the federal government has supervised or completed cleanup work at over one thousand sites across the United States since CERCLA’s inception in 1980.³¹ Indeed, the federal government has raised billions of dollars for remediation of hazardous waste sites.³²

Thus, through the Superfund, Congress ensured that “the federal government [could] provide an efficacious response to environmental hazards” even where no private party was identified as financially liable for those hazards.³³ Clearly, CERCLA evidences “broad remedial goals” through its “attempt[] to allocate the financial costs of cleanup . . . to those actors believed to be responsible.”³⁴ Equally

²⁵ CERCLA itself provides statutory exemptions from liability. See, e.g., 42 U.S.C. § 9601(20)(D) (2000) (providing an exception to liability where a state or local government acquires title to a contaminated facility involuntarily through, for example, tax delinquency); 42 U.S.C. § 9607(r) (Supp. IV 2004) (creating an exemption for bona fide prospective purchasers). Additionally, the courts have limited the reach of private liability under certain circumstances. See, e.g., *Robertshaw Controls Co. v. Watts Regulator Co.*, 807 F. Supp. 144, 150 (D. Me. 1992) (limiting ownership liability where a party held title only briefly to facilitate a multiple step transaction).

²⁶ Ronald H. Rosenberg, *The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers*, 36 CONN. L. REV. 425, 457 (2004).

²⁷ Christine Todd Whitman, Op-Ed, *Keep the Momentum for Superfund Cleanups*, N.Y. TIMES, July 18, 2002, at A21.

²⁸ 42 U.S.C. § 9611 (2000).

²⁹ See ROGER W. FINDLEY ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 739 (6th ed. 2003) (describing how the Superfund trust, as well as special excise taxes on industry, pays for cleanup). Note, however, that the current Bush administration refused to reinstate special industry taxes to replenish the Superfund. See *infra* text accompanying notes 37-45.

³⁰ RAMSEUR & REISCH, *supra* note 5, at 12.

³¹ See U.S. EPA, *supra* note 4.

³² See 42 U.S.C. § 9611(a) (2000) (providing for over \$13 billion in funding to the Superfund); FINDLEY ET AL., *supra* note 29, at 739 (noting that special industry taxes raised about \$4 million per day for the Superfund until December 1995, when they expired).

³³ *N. Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 649 (7th Cir. 1998).

³⁴ Rosenberg, *supra* note 26, at 457. Rosenberg notes that many courts have understood CERCLA’s broad remedial goals to provide support for an “extremely broad

clear, Congress understood that it would not always be possible to identify the private party responsible for hazardous waste releases, and thus created public funding mechanisms to clean up these orphan sites.

B. *The Economics of CERCLA Successor Liability*

As the preceding discussion suggests, private liability under CERCLA constitutes a significant cost to parties held responsible for hazardous waste contamination. Additionally, changes in federal funding for the program may create incentives for the EPA to attempt to impose private liability on additional parties.

The application of successor liability under CERCLA often means the difference between no liability and millions of dollars in response costs to an alleged successor corporation. For example, the average cost of remedial action at "mega sites" is \$140 million.³⁵ While "mega sites" are, as their name suggests, the worst case scenario, non-mega site costs still average in the millions of dollars.³⁶

Additionally, private CERCLA liability—both generally and as applied to alleged corporate successors—may be increasing in significance. Until 1995, special federal taxes (excise taxes on the petroleum and chemical industries, as well as a general corporate environmental income tax) were levied to fund the Superfund trust that paid for most federal cleanup activities.³⁷ Congress allowed these taxes to expire in 1995; by the end of the 2003 fiscal year the trust fund was essentially depleted.³⁸ Since that time, federal spending under CERCLA has been funded almost entirely through general ap-

interpretation of its liability provisions." *Id.* However, as argued above, CERCLA's strict liability scheme must be balanced against the fact that Congress provided for public funding of cleanup where responsible parties were not present.

³⁵ RAMSEUR & REISCH, *supra* note 5, at 13 n.46.

³⁶ *See id.* at 17 (noting that non-mega sites average about \$22 million in cleanup costs in the mining industry and about half as much in other industries).

³⁷ *See id.* at 11.

³⁸ *See id.* The termination of the special Superfund taxes may signal a shift in congressional policy. That is, by essentially killing the Superfund, Congress may have intended to shift the cost of cleanup from the industry generally to PRPs. If so, it may be appropriate for federal courts to interpret and apply CERCLA even more broadly to allow the government to collect from any party that is arguably a PRP, including successor corporations. *See FALLON ET AL.*, *supra* note 7, at 707 (describing the theory of "dynamic statutory interpretation," which seeks to "adjust statutes to changed circumstances, to the views of the current legislature, or more generally to evolving social understandings").

appropriations—and these appropriations have been significantly below projected needs.³⁹ These funding shortfalls have forced the EPA to delay remedial work at a number of hazardous waste sites.⁴⁰ Additionally, there is some evidence that the EPA has been hesitant to add mega sites to the National Priorities List⁴¹ unless a private responsible party has been identified.⁴²

Given these budgetary limitations, the EPA may attempt to shift response costs to private parties.⁴³ As noted above, federal funds are primarily spent at “orphan sites” for which no private responsible party can be identified. Thus, in order to shift costs to private parties, the EPA may increasingly seek to identify private parties that can be held legally responsible through doctrines such as successor liability.

Given these stakes, the EPA, as well as corporations threatened with CERCLA liability, have significant incentives to litigate successor liability issues. Unfortunately, transaction costs already constitute between twenty-eight and forty-six percent of total spending for an average CERCLA cleanup.⁴⁴ Resolving the instant circuit split may help provide the clarity in the law necessary to reduce, or at least to prevent the worsening of, these inefficiencies.⁴⁵

³⁹ See RAMSEUR & REISCH, *supra* note 5, at 13 fig.3. Ramseur and Reisch estimate the shortfall to range between almost \$600 million in the 2003 fiscal year and \$450 million in the 2006 fiscal year. See *id.*

⁴⁰ *Id.* at 14.

⁴¹ The National Priorities List (NPL) constitutes the official list of the worst sites. Listing on NPL is a necessary precondition for use of federal Superfund trust dollars for remedial cleanup at a site. 40 C.F.R. § 300.425(b)(1) (2004).

⁴² See RAMSEUR & REISCH, *supra* note 5, at 4 (noting that “Superfund budgetary issues” affect EPA decisions regarding NPL listing).

⁴³ The Bush administration has justified its refusal to ask Congress to reinstate the special Superfund taxes by arguing that the “polluter pays” principle suggests that responsible parties should be identified and made to pay for hazardous waste cleanup. *Id.* at 12. Moreover, the EPA can recover attorneys’ fees from private responsible parties, which suggests that the EPA may have incentives to try to litigate issues of private liability. See FINDLEY ET AL., *supra* note 29, at 739-40 (collecting cases interpreting the “response costs” authorized by 42 U.S.C. § 9607(a) (2000) to include attorneys’ fees).

⁴⁴ See U.S. GEN. ACCOUNTING OFFICE, SUPERFUND: LEGAL EXPENSES FOR CLEANUP-RELATED ACTIVITIES OF MAJOR U.S. CORPORATIONS 6 tbl.1 (1994).

⁴⁵ This remains true even though this I ultimately argue that CERCLA successor liability should be governed by application of state law rather than uniform federal common law, and even though I stress that these state rules are equitable doctrines that should be applied as fairness requires in specific cases. Resolving the split as advocated herein at least frames the issue with more certainty than presently available. Moreover, a significant body of state court decisions exists to help corporate planners understand the contours of successor liability when structuring specific transactions.

II. SUCCESSOR LIABILITY UNDER CERCLA

CERCLA imposes private liability on four classes of responsible parties.⁴⁶ However, the statute is silent regarding the private liability of a firm that purchases the assets of, or merges or otherwise combines with, a responsible party. While the federal courts of appeals that have addressed the issue have unanimously held that CERCLA may impose private successor liability,⁴⁷ the circuits have split over the rules governing the imposition of such liability.

A. *Asset Purchasers, the General Rule of Nonliability, and the Exceptions*

Traditionally, the structure of a corporate transaction dictates the extent to which the acquiring corporation assumes the liabilities of the selling corporation.⁴⁸ There are three basic structures for corporate transactions relevant here.

First, under a statutory merger or consolidation the purchaser assumes by operation of law all the liabilities and obligations of the seller.⁴⁹ Second, the purchaser may acquire the stock of the seller. Under this scenario, the purchaser owns the seller as a controlling stockholder, but without a subsequent merger, the purchaser generally will be liable only for the value of its investment (i.e., the purchase price).⁵⁰ Finally, under an asset sale⁵¹ transaction, the purchaser tradi-

⁴⁶ See *supra* note 23 and accompanying text (describing the four classes of PRPs).

⁴⁷ See *United States v. Gen. Battery Corp.*, 423 F.3d 294, 298 n.3 (3d Cir. 2005) (collecting cases).

⁴⁸ See generally FRANKLIN A. GEVURTZ, *BUSINESS PLANNING* 1002-05 (3d ed. 2001) (describing the extent to which a purchaser assumes the liabilities of a seller depending on the form of corporate transaction at issue).

⁴⁹ See, e.g., DEL. CODE ANN. tit. 8, § 259(a) (2001) (“[A]ll debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.”).

⁵⁰ GEVURTZ, *supra* note 48, at 1005.

⁵¹ Because asset sales are the primary subject of this Comment, a concrete example may be helpful. The following facts are drawn from the transaction at issue in *City Management Corp. v. United States Chemical Co.*, 43 F.3d 244, 246-50 (6th Cir. 1994). Corporation A has two shareholders and is engaged in the business of chemical solvent recycling and disposal. A disposed of the chemicals at a nearby landfill. A also had a permit to store chemicals on-site. Corporation B is engaged in a similar business but does not have the permits needed to store wastes at its facility. A's shareholders decide to sell their business to B. B paid over \$700,000 for “all right, title and interest to all of the tangible and intangible assets which comprise [A's] business” with some named exceptions. B also expressly assumed all environmental liabilities at A's facility but expressly disclaimed assumption of other risks. A informed its customers that B would

tionally bears only those liabilities of the seller that the purchaser agrees to assume.⁵² Thus, an asset purchaser is by default not liable for the debts and obligations of the seller.

Given these characteristics, the asset purchase may provide unique protection for the purchaser against unforeseen liabilities. This result is supported by several corporate policy justifications. For example, as long as the seller receives adequate consideration for its assets, the seller's creditors will generally be protected even if the purchaser does not assume liability.⁵³ However, corporate law also recognizes several exceptions to the general rule of asset purchaser nonliability.

1. The Traditional Exceptions

Most states recognize a set of four "traditional" exceptions to asset purchaser nonliability.⁵⁴ A corporation that purchases the assets of another corporation may face liability for the seller's obligations if (1) the purchaser makes an express or implied agreement to assume the obligations, (2) the transaction is effectively a merger or consolidation of the parties (de facto merger), (3) the purchaser is a continuation of the selling corporation (mere continuation), or (4) the transaction is being used fraudulently to avoid liability for the obligations.⁵⁵ Additionally, inadequate consideration is occasionally considered a fifth

continue the business, and *B* in fact continued to serve *A*'s former customers. *B* also hired all but one of *A*'s nonmanagement employees. But, none of *A*'s officers or shareholders continued with *B*. *A* did not dissolve after the sale, but maintained no assets other than the proceeds of the sale. Finally, prior to the sale *A* was informed that it was potentially liable under CERCLA for its disposal of wastes at the offsite landfill. *A* did not inform *B* of that potential liability.

⁵² GEVURTZ, *supra* note 48, at 1003.

⁵³ See George L. Lenard, Note, *Products Liability of Successor Corporations: A Policy Analysis*, 58 IND. L.J. 677, 683 (1983) (describing justifications for the rule of nonliability). Lenard also notes that contract principles also support nonliability; the purchaser should not be bound by an agreement to which it was not a party. *Id.* at 683-84. Moreover, asset purchaser nonliability also promotes the alienability and transferability of corporate assets; Lenard argues that it may thus be analogous to the bona fide purchaser doctrine in real property law. *Id.* at 684-85.

⁵⁴ Importantly, even these "traditional" exceptions are not uniformly accepted by all states. For example, unlike most states, Delaware has refused to put the substance of a transaction over its form by rejecting the de facto merger doctrine. See *Hariton v. Arco Elecs., Inc.*, 188 A.2d 123, 125 (Del. 1963) (rejecting the de facto merger exception to asset purchaser nonliability).

⁵⁵ MELVIN ARON EISENBERG, *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS* 1075 (9th ed. 2005).

exception within this group; inadequate consideration may also be considered an element of the preceding exceptions.⁵⁶

Application of these exceptions requires a court to balance the benefits of adhering to corporate formalities against the potential for unfair denials of legal relief to creditors and other claimants (e.g., tort victims). Generally, courts "construe these exceptions strictly because there is such a strong presumption against holding asset purchasers liable for the acts of their predecessors."⁵⁷ On the other hand, these exceptions are rooted in equity and may be applied as fairness requires.⁵⁸ Finally, state law with regard to the traditional exceptions varies across the states.⁵⁹ Nonetheless, the outlines of the traditional exceptions are relatively clear.

The first traditional exception involves the express or implied assumption of liability by the asset purchaser. Importantly, the express assumption of some of the seller's liabilities does not imply assumption of all those liabilities.⁶⁰ Generally, an asset purchaser only impliedly assumes an obligation of the seller if the purchaser's conduct or representations show an intention to assume that obligation.⁶¹ Thus, this exception recognizes that it is appropriate to derogate from the general rule of asset purchaser nonliability where there is evidence that the parties' bargain (i.e. the purchase price) reflected the allocation of liability.⁶²

The second traditional exception—the "de facto merger"—occurs where the substance, but not the form, of a transaction is equivalent

⁵⁶ 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122, at 247-48 (perm. ed., rev. vol. 1999).

⁵⁷ Schnapf, *supra* note 10, at 444.

⁵⁸ See *N. Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 657 (7th Cir. 1998).

⁵⁹ See Schnapf, *supra* note 10, at 444-45 (noting the existence of divergent state standards for the traditional exceptions, especially the de facto merger and mere continuation exceptions).

⁶⁰ FLETCHER ET AL., *supra* note 56, § 7124, at 295-96.

⁶¹ *Id.* at 293-95. Under the facts of the example introduced *supra* in note 51, corporation *B* would not be liable as *A*'s successor for the CERCLA liability at the landfill under an express or implied assumption of liability theory. *B* assumed only *A*'s environmental liabilities at *A*'s facility and expressly disclaimed any others. Moreover, there is no evidence to suggest that *B* impliedly intended to assume liability for *A*'s disposal of wastes at the landfill. Cf. *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 256 (6th Cir. 1994).

⁶² See Christopher J. Neumann, *Successor Liability and CERCLA: The Runaway Doctrine of Continuity of Enterprise*, 27 ENVTL. L. 1373, 1383-84 (1997) (arguing that the exception seeks to force firms to internalize the costs of their business activities through negotiation over price and assumption of liabilities).

to a statutory merger. In such cases, courts may impose all of the seller's debts and obligations on the purchaser as occurs under a statutory merger.⁶³ Generally, a de facto merger may exist if there is

(1) a continuation of the enterprise of the seller corporation, [i.e.,] . . . continuity of management, personnel, physical location, assets and general business operations; (2) a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation; (3) the seller corporation ceases its ordinary business operation, liquidates and dissolves as soon as legally and practically possible; and (4) the purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.⁶⁴

However, courts sometimes apply the de facto merger exception notwithstanding the absence of one or more of these factors.⁶⁵

Third, the mere continuation exception applies where the entity of the purchaser corporation is simply a continuation or "reincarnation" of the seller corporation.⁶⁶ "The traditional indications of 'continuation' are: common officers, directors, and shareholders; and only one corporation in existence after the completion of the sale of assets."⁶⁷ Additionally, courts often consider supplementary factors "such as continuation of the seller's business practices and policies and the sufficiency of consideration."⁶⁸ The basic justification for the

⁶³ Importantly, Delaware does not recognize the de facto merger exception. See *infra* Part II.A.4.

⁶⁴ FLETCHER ET AL., *supra* note 56, § 7124.20. Under the facts of the example introduced *supra* in note 51, the de facto merger would not strictly apply to make *B* liable as *A*'s successor. On the one hand, there is some continuation of enterprise (same assets and employees) and *B* did assume some of *A*'s obligations (e.g., continued to serve *A*'s customers). However, there is no continuity of ownership following the cash sale and *A* did not dissolve following the sale.

⁶⁵ FLETCHER ET AL., *supra* note 56, § 7124.20. Application of the de facto merger exception notwithstanding the absence of a finding of one of the preceding elements should not be surprising, given that the doctrine is rooted in equity. That is, provided that the court applies these elements and finds that fairness requires an imposition of liability on the purchaser, the absence of a specific element should not be fatal. See, e.g., *N. Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 657 (7th Cir. 1998) (applying the de facto merger and mere continuation exceptions and arguing that "the equities of this case . . . [are] the crucial and decisive element of our analysis").

⁶⁶ FLETCHER ET AL., *supra* note 56, § 7124.10.

⁶⁷ *Id.*

⁶⁸ *Id.* Under the facts of the example introduced *supra* in note 51, the mere continuation exception would not apply to make *B* a successor to *A*'s CERCLA liabilities. Most importantly, this exception does not apply because there is no continuation of

mere continuation exception is that corporate formalities may be disregarded where the purchaser simply constitutes a reorganization of the seller entered into so as to avoid the seller's creditors.⁶⁹

Finally, where an asset purchase constitutes a fraud upon the creditors of the seller, the purchaser may become liable to the defrauded creditors.⁷⁰ However, as long as the purchaser pays adequate consideration in good faith, the asset purchase is not fraudulent.⁷¹

2. The Modern Exceptions

As noted above, the traditional exceptions to asset purchaser nonliability are relatively narrow. These limits result from a judicial hesitancy to stray too far from the corporate law principles embodied in the general rule of nonliability.⁷² However, a minority of states as well as some federal courts have adopted broader exceptions to the general rule over the past thirty years: the substantial continuity and products line exceptions.

As commonly formulated, the substantial continuity exception (also referred to as the continuity of enterprise exception) imposes successor liability on an asset purchaser if there exists "(1) continuity of management, personnel, physical location, and assets; (2) dissolution of the predecessor [seller]; (3) assumption of the ordinary business obligations and liabilities by the successor [purchaser]; and (4) the successor's [purchaser's] presentation of itself as the continuation of the predecessor [seller]."⁷³

shareholders (no common ownership) and A did not dissolve (both corporations remained after the sale). Cf. *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 252-53 (6th Cir. 1994).

⁶⁹ See FLETCHER ET AL., *supra* note 56, § 7124.10; see also Schnapf, *supra* note 10, at 448 ("[B]ecause shareholders benefit from the good fortunes of a corporation, they should not enjoy the profits of an enterprise that has avoided its pretransaction liabilities through corporate formalities.").

⁷⁰ FLETCHER ET AL., *supra* note 56, § 7125.

⁷¹ *Id.* Again, under the facts of the example introduced *supra* in note 51, the fraud exception would not apply to B. There is no evidence that B failed to pay adequate consideration for A's assets. Cf. *City Mgmt. Corp.*, 43 F.3d at 253-55.

⁷² See George W. Kuney, *Jerry Phillips' Product Line Continuity and Successor Corporation Liability: Where Are We Twenty Years Later?*, 72 TENN. L. REV. 777, 778 (2005) (arguing that the traditional exceptions demonstrate a judicial view of "corporate-supremacy-over-tort-policy").

⁷³ FLETCHER ET AL., *supra* note 56, § 7123.20; see also *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 883-84 (Mich. 1976) (applying the substantial continuity exception in the strict products liability context). In a later Michigan case, the fourth element was held to be unessential to a finding of substantial continuity between the pur-

The substantial continuity exception drops the requirement of shareholder continuity present in both the de facto merger and mere continuation exceptions.⁷⁴ Generally, courts applying the substantial continuity exception have considered the "totality of the transaction"; thus, the presence or absence of a single factor is not determinative.⁷⁵

The substantial continuity exception is rooted in federal labor cases⁷⁶ and state strict products liability doctrine.⁷⁷ The exception privileges the goals of these substantive legal areas over corporate law principles.⁷⁸ This exception recognizes that the form of the corporate transaction is irrelevant from the standpoint of the injured party.⁷⁹

chaser and seller. See *Foster v. Cone-Blanchard Mach. Co.*, 597 N.W.2d 506, 510 n.6 (Mich. 1999) ("[A] truer reading of *Turner* suggests that the first three guidelines were intended to complete the continuity [of] enterprise inquiry where there is a sale of corporate assets."). Under the facts of the example introduced *supra* in note 51, *B* may be liable as *A*'s successor for *A*'s CERCLA liability. There is continuity of assets and personnel between *A* and *B*. *B* assumed *A*'s obligations to *A*'s employees and customers. *B* held itself out as a continuation of *A*. On the other hand, *A* did not dissolve following the sale, so the court would have to decide whether *all* elements must be present to fairly apply the exception to these facts. Cf. *City Mgmt. Corp.*, 43 F.3d at 250-51 (noting that the district court applied a modified version of the substantial continuity test and found no successor liability (for *B*) because there was no nexus between the purchaser and the conduct giving rise to CERCLA liability).

⁷⁴ See *Turner*, 244 N.W.2d at 880 ("The presence of stock as consideration should be one factor to use to determine whether there exists a sufficient nexus between the successor and predecessor corporations to establish successor liability. However, the absence of an exchange of stock should not not be conclusive."); see also *Turner v. Wean United, Inc.*, 531 So. 2d 827, 832 (Ala. 1988) ("Although a finding of control by the same shareholders in both the acquiring company and the selling company is relevant for purposes of . . . finding a de facto merger, it is not relevant to the question of continuity of enterprise."); Kuney, *supra* note 72, at 780-82 (noting that *Turner v. Bituminous Casualty Co.* explicitly analyzed the substantial continuity exception as a loosening of the de facto merger exception by requiring only three of the four de facto criteria to assert liability under the substantial continuity category).

⁷⁵ Schnapf, *supra* note 10, at 453.

⁷⁶ See, e.g., *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 182 n.5 (1973) (arguing that "[t]he perimeters of the labor-law doctrine of successorship . . . have not been . . . narrowly confined" to the traditional exceptions to asset purchaser nonliability).

⁷⁷ See, e.g., *Turner v. Bituminous Cas. Co.*, 244 N.W.2d at 877-80 (analyzing the problem of successor liability as one of strict products liability principles and arguing that products liability requires broader exceptions to asset purchaser nonliability); see also *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1154 (1st Cir. 1974) (holding that, under New Hampshire state products liability law, an asset purchaser may be held liable for the torts of its predecessor).

⁷⁸ For federal labor law, see *Golden State Bottling Co.*, 414 U.S. at 183 n.5 ("The refusal to adopt a mode of analysis requiring the Board to distinguish among mergers . . . and purchases of assets is attributable to the fact that, so long as there is a continuity in the 'employing industry,' the public policies underlying the doctrine will be served by its broad application."). For state products liability law, see Kuney, *supra* note 72, at

The products line exception goes even further. Generally, the products line exception may be applicable if (1) the asset purchaser acquires "substantially all of the [seller's] assets, leaving no more than a corporate shell remaining"; (2) the purchaser holds "itself out to the public as a continuation of the" seller, and does so "by producing the same product line under a similar name"; and (3) the purchaser benefits from the "good will" of the seller.⁸⁰ Additionally, some courts consider whether the purchaser possesses the ability to assume the original manufacturer's risk-spreading role.⁸¹

As with the substantial continuity exception, the products line exception privileges the policy goals of strict products liability over corporate law principles.⁸² The products line exception is based primarily on three justifications rooted in products liability. First, as noted above, the asset purchaser may assume the original manufacturer's risk-spreading role because it possesses "virtually the same ability as the predecessor to estimate the risks of product liability claims, to insure against them, and to pass on the costs of insurance or damages

777-78 (arguing that the criteria underlying the traditional exceptions "are irrelevant to . . . products liability law," and that "successors [should be] liable for the product defects of their predecessors when they have purchased a seller's business" because fairness in this context requires the "successor [to take] the bad with the good").

⁷⁹ See generally *Lenard*, *supra* note 53, at 677 ("For corporate planners, the ability to structure a corporate acquisition as an asset acquisition, thus avoiding liability, is an obvious benefit of this traditional rule. For products liability plaintiffs, however, the traditional rule is an undesirable obstacle to the recovery of compensation for their injuries.").

⁸⁰ *FLETCHER ET AL.*, *supra* note 56, § 7123.30; see also *Ray v. Alad Corp.*, 560 P.2d 3, 11 (Cal. 1977) (creating a products line exception and holding that "a party which acquires a manufacturing business and continues the output of its line of products . . . assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by [the seller]"); *Ramirez v. Amsted Indus.*, 431 A.2d 811, 825 (N.J. 1981) ("[W]here one corporation acquires all or substantially all the manufacturing assets of another corporation . . . and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line . . .").

⁸¹ See *Ray*, 560 P.2d at 8-9. Under the facts of the example introduced *supra* in note 51, *B* would be liable as *A*'s successor for the latter's CERCLA liabilities. *B* purchased all of *A*'s assets. *B* benefited from *A*'s goodwill; it continued to serve *A*'s customers as a continuation of *A*. *B* held itself out as a continuation of *A* by offering the same services. *A* remained only as a corporate shell following the sale.

⁸² See, e.g., *Ramirez*, 431 A.2d at 825 ("The social policies underlying strict products liability . . . are best served by extending strict liability to a successor corporation that acquires . . . and continues . . . the same line of products as its predecessor, particularly where the successor . . . benefits from [the predecessor's] name[,] good will, business reputation and established customers.").

paid to purchasers of the product.”⁸³ Second, the asset sale may destroy the plaintiff’s remedy against the original manufacturer.⁸⁴ Finally, the products line exception “rests upon . . . the fairness of requiring the successor to assume a responsibility for defective products” given that the successor enjoys “the original manufacturer’s good will . . . in the continued operation of the business.”⁸⁵

Clearly, these considerations stray far from the traditional concerns of corporate law.⁸⁶ Moreover, the purchase of the assets of a single product line may suffice for the imposition of successor liability under this exception. Thus, the products line exception, even more than the substantial continuity exception, “creates an enormous potential for liability because an asset purchaser does not have to acquire an entire business for a court to impose” successor liability.⁸⁷

Finally, only a minority of states have adopted these broader exceptions to the general rule of asset purchaser nonliability. At most, twelve states have adopted or treated favorably either the substantial continuity or products line exceptions.⁸⁸ Moreover, those states that have adopted these exceptions have generally not extended their application of strict products liability to cases based on negligence.⁸⁹

⁸³ Lenard, *supra* note 53, at 679.

⁸⁴ Ray, 560 P.2d at 9.

⁸⁵ *Id.*

⁸⁶ See *supra* note 53 and accompanying text (discussing corporate law principles underlying the general rule of asset purchaser nonliability).

⁸⁷ Schnapf, *supra* note 10, at 449. *But cf.* Kuney, *supra* note 72, at 785 (arguing that the products line and substantial continuity exceptions are basically identical because they look to similar elements).

⁸⁸ See Kuney, *supra* note 72, at 794 n.129 (collecting cases). Kuney’s list appears overinclusive. For example, he counts Massachusetts as a substantial continuity state on the basis of *Cargill, Inc. v. Beaver Coal & Oil Co.*, 676 N.E.2d 815 (Mass. 1997). However, that case explicitly refused to adopt the substantial continuity exception. *Id.* at 819 n.8. Moreover, other estimates are lower. See, e.g., Alfred R. Light, “Product Line” and “Continuity of Enterprise” Theories of Corporate Successor Liability Under CERCLA, 11 MISS. C. L. REV. 63, 68-69 (1990) (finding only four states to have adopted the products line exception). Nonetheless, several important industrial states, such as California, Michigan, and New Jersey, clearly recognize the broader exceptions to asset purchaser nonliability. See Kuney, *supra* note 72, at 795 n.129.

⁸⁹ See Kuney, *supra* note 72, at 790 (noting that California courts have limited Ray to strict products liability); Schnapf, *supra* note 10, at 450 n.72 (noting that several states have limited application of these exceptions to strict products liability cases in which the asset sale destroyed the plaintiff’s remedy against the original manufacturer).

3. Delaware Law

A majority of large, publicly held corporations are incorporated under Delaware law.⁹⁰ Importantly, these publicly held corporations generally do business in a large number of states.⁹¹ As the state of incorporation for these corporations, Delaware law potentially provides the governing principles for their successor liability under CERCLA.⁹²

Delaware law does not recognize the modern, broader exceptions to asset purchaser nonliability.⁹³ Moreover, Delaware law does not recognize the *de facto* merger theory.⁹⁴ Similarly, Delaware courts have narrowly construed the mere continuation exception.⁹⁵ In sum, Delaware law provides (perhaps uniquely) significant protections for asset purchasers.

⁹⁰ See State of Delaware: Division of Corporations, About Agency, <http://www.state.de.us/corp/aboutagency.shtml> (last visited Jan. 20, 2008) (noting that over 50% of all publicly traded U.S. companies and 60% of Fortune 500 companies are incorporated under Delaware law).

⁹¹ EISENBERG, *supra* note 55, at 107.

⁹² Under traditional choice of law doctrine, "a corporation's internal affairs are governed by the law of its state of incorporation—even if the corporation has no business contacts with that state." *Id.* But see *infra* Part III (arguing that under choice of law principles the law of the state of hazardous release, and not the law of the state of incorporation, should generally govern questions of CERCLA successor liability because that state generally has the most significant relationship to the legal occurrence at issue).

⁹³ See *Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535, 540 (D. Del. 1988) (finding that Delaware law recognizes, at most, only the traditional exceptions).

⁹⁴ See *Hariton v. Arco Elecs., Inc.*, 188 A.2d 123, 125 (Del. 1963) (rejecting the *de facto* merger doctrine). But cf. *Sheppard v. A.C. & S. Co.*, 484 A.2d 521, 524-25 (Del. Super. Ct. 1984) (noting that the "question of successor liability for torts apparently has not been directly considered in Delaware" and favorably discussing—but not adopting—the *de facto* merger exception).

⁹⁵ See *Elmer*, 698 F. Supp. at 542 ("Delaware courts have narrowly construed the continuation theory. In order to recover under this theory in Delaware, it must appear that the former corporation is the same legal entity as the latter; that is, 'it must be the same legal person, having a continued existence under a new name.'" (citations omitted) (quoting *Fountain v. Colonial Chevrolet Co.*, No. 86C-JA-117, 1988 WL 40019, at *9 (Del. Super. Ct. Apr. 13, 1988))). Delaware law apparently does recognize the express or implied assumption of liability and fraud exceptions to asset purchaser nonliability. See *id.* at 540-42.

B. Statutory Silence and the Circuit Split

Notwithstanding the development of successor liability law, Congress failed to specify whether CERCLA liability extends to corporate successors.⁹⁶

As noted above, CERCLA imposes liability on all current and former owners or operators of hazardous waste sites as well as generators or transporters of hazardous waste.⁹⁷ However, CERCLA does not explicitly answer the question of whether a corporate successor to such a liable party would face CERCLA liability if the successor did not otherwise fall within the statutory definition of a liable party. For example, could a corporation that purchased the assets of another firm be liable under CERCLA for hazardous waste releases that resulted from the seller's improper offsite disposal of hazardous waste?⁹⁸

The federal courts of appeals that have addressed the question have unanimously held that CERCLA liability may extend to corporate successors.⁹⁹ Generally, the courts of appeals have reached this conclusion through close analysis of the terms of CERCLA and the general rules of statutory construction contained within the United States Code.¹⁰⁰ CERCLA imposes liability on "persons,"¹⁰¹ which is defined to include, *inter alia*, a "firm, corporation, association, partnership, consortium, joint venture [or] commercial entity."¹⁰² Moreover, these

⁹⁶ See 42 U.S.C. § 9607(a) (2000) (imposing CERCLA liability on the enumerated parties, which do not explicitly include successor firms); *see also, e.g.*, *United States v. Gen. Battery Corp.*, 423 F.3d 294, 298 (3d Cir. 2005) (noting that CERCLA fails to explicitly address successor liability).

⁹⁷ See *supra* notes 22-23 and accompanying text.

⁹⁸ That is, under this fact pattern, the seller is liable as the generator of the hazardous waste. But, the purchaser is not the current operator of the facility at which the release occurred, did not generate the waste, and did not transport the waste. Thus, the purchaser may only face CERCLA liability under a theory of successor liability.

The question of CERCLA successor liability became even more important after Congress amended CERCLA to include the prospective purchaser defense. See 42 U.S.C. § 9607(r) (Supp. IV 2004) ("[A] bona fide prospective purchaser whose potential liability . . . is based solely on the purchaser's being considered to be an owner or operator . . . shall not be liable as long as [it] does not impede the performance of a response action."). That is, current owners or operators of a facility are not *directly* liable under CERCLA for contamination caused by past owners if the current owners meet the requirements of § 9607(r). Nonetheless, the current owner may still be held liable *indirectly* as the successor of the past owner.

⁹⁹ See *supra* note 6.

¹⁰⁰ See, *e.g.*, *Gen. Battery Corp.*, 423 F.3d at 298; *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1246-47 (6th Cir. 1991).

¹⁰¹ 42 U.S.C. § 9607(a)(2)-(4) (2000).

¹⁰² *Id.* at § 9601(21).

terms generally "shall be deemed to embrace the words 'successors and assigns of such [commercial entities].'"¹⁰³

Notwithstanding the unanimity of the courts of appeals with regard to CERCLA's implicit recognition of successor liability, these courts have split over the appropriate rules to govern such liability. While the Supreme Court has not addressed this specific question, it has created a framework to guide federal courts engaged in common law rulemaking necessary to fill federal statutory gaps. Nonetheless, the courts of appeals have split on whether the federal common law of CERCLA successor liability should incorporate state rules or involve the judicial creation of a federal rule. The Third,¹⁰⁴ Fourth,¹⁰⁵ and Eighth¹⁰⁶ Circuits have adopted or treated favorably judicially created federal rules to govern the imposition of successor liability under CERCLA. Conversely, the First,¹⁰⁷ Second,¹⁰⁸ Sixth,¹⁰⁹ and Eleventh¹¹⁰ Circuits have incorporated state law as the rule of decision for CERCLA successor liability.¹¹¹

1. *Kimbell Foods*

In *United States v. Kimbell Foods, Inc.*¹¹² and its progeny, the Supreme Court developed a framework for determining whether the federal common law rule of decision addressing an issue otherwise unaddressed by federal statute should be provided by a judicially created federal rule¹¹³ or by incorporation of state law. As noted above,

¹⁰³ 1 U.S.C. § 5 (2000).

¹⁰⁴ *Gen. Battery Corp.*, 423 F.3d at 303-04.

¹⁰⁵ *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992).

¹⁰⁶ *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 487 n.9 (8th Cir. 1992).

¹⁰⁷ *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001).

¹⁰⁸ *New York v. Nat'l Serv. Indus.*, 460 F.3d 201, 207-09 (2d Cir. 2006).

¹⁰⁹ *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994).

¹¹⁰ *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501-02 (11th Cir. 1996).

¹¹¹ The Ninth Circuit earlier used federal common law to govern successor liability under CERCLA. See *Louisiana-Pac. Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990). More recently, the Ninth Circuit questioned that approach but did not explicitly overrule *Louisiana-Pacific*. See *Atchinson, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 364 (9th Cir. 1998) (refusing to overrule *Louisiana-Pacific* because the state and federal common law were identical as applied to the facts at issue).

¹¹² 440 U.S. 715 (1979).

¹¹³ While *Erie Railroad Co. v. Tompkins* held that "[t]here is no federal general common law," 304 U.S. 64, 78 (1938), the federal courts may nonetheless create fed-

CERCLA does not provide rules to govern successor liability for hazardous waste contamination.¹¹⁴ Thus, *Kimbell Foods* provides the appropriate framework for determining whether a federal rule or state law should govern CERCLA successor liability.¹¹⁵

Kimbell Foods involved the question of whether liens arising under two federal loan programs took precedence over private liens on the same property. No federal statute addressed this question of lien priorities.¹¹⁶ The Supreme Court concluded "that the source of law is federal" because the loans were made by federal agencies acting under federal statute, "but that a national rule is unnecessary to protect the federal interests."¹¹⁷ Thus, the court adopted "state law as the appropriate federal [common law] rule for establishing the relative priority of these competing federal and private liens."¹¹⁸

eral common law "to fill the interstices of federal legislation according to their own standards," *Kimbell Foods*, 440 U.S. at 727 (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)). The *Kimbell Foods* framework explains which factors the federal courts should consider when deciding whether such gap-filling should be conducted through creation of federal rules of decision or by incorporation of state law. 440 U.S. at 728-29.

¹¹⁴ *Kimbell Foods* applies where a federal statute is completely silent as to a particular issue. This situation is analytically distinct from one in which the court engages in statutory interpretation of an ambiguous provision. See *United States v. Gen. Battery Corp.*, 423 F.3d 294, 311 n.14 (3d Cir. 2005) (Rendell, J., concurring in part and dissenting in part) (noting that the court was neither "construing a word or phrase in the statute" nor interpreting "the meaning of a term contained in CERCLA" to determine the appropriate rules for CERCLA successor liability).

¹¹⁵ Note, however, that most of the earlier decisions from courts of appeals regarding CERCLA successor liability did not explicitly apply the *Kimbell Foods* framework. See Rosenberg, *supra* note 26, at 468-500 (reviewing the federal appellate courts' failure to apply *Kimbell Foods* to CERCLA successor liability). The more recent cases, on the other hand, have applied *Kimbell Foods* and its progeny. See, e.g., *New York v. Nat'l Serv. Indus. (Nat'l Serv. Indus. II)*, 460 F.3d 201, 207-09 (2d Cir. 2006) (applying *Kimbell Foods* and finding that state law governs); *Gen. Battery Corp.*, 423 F.3d at 303-04 (applying *Kimbell Foods* and finding that federal common law governs).

¹¹⁶ *Kimbell Foods*, 440 U.S. at 727 (explaining that the "statutes authorizing these federal lending programs do not specify the appropriate rule of decision" and that "[f]ederal law therefore controls the Government's priority rights").

¹¹⁷ *Id.* at 718.

¹¹⁸ *Id.* Several commentators note that the decision whether to judicially create a federal rule involves a two-step analysis. First, does the court have the authority or competence to create a federal rule in the particular context? Second, if the court does have that authority, should it, as a matter of discretion, exercise that authority? FALLON ET AL., *supra* note 7, at 700. *Kimbell Foods* answered the first question affirmatively because the Supreme Court clearly indicated that federal law governed the liens, but answered the second question in the negative: based on its three-part analysis of the competing federal and state interests, the Court held that, as a matter of discretion, the creation of a federal rule was not appropriate. *Id.* at 701.

Importantly, the Court identified three factors to guide lower federal courts faced with similar gap-filling situations. First, "federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules."¹¹⁹ On the other hand, "state law may be incorporated as the federal rule of decision" where "there is little need for a nationally uniform body of law."¹²⁰ Second, if the "application of state law would frustrate specific objectives of the federal program[]" at issue, the courts should "fashion special [federal] rules solicitous of those federal interests."¹²¹ Third, incorporation of state law is appropriate where "application of a federal rule would disrupt commercial relationships predicated on state law."¹²²

Subsequent Supreme Court cases have refined the *Kimbell Foods* analysis. First, when federal courts engage in this analysis, they must consider "the particular state law in question" rather than general legal principles.¹²³ That is, the courts must determine if the law of the particular state at issue conflicts with federal policy.

Second, and equally importantly, subsequent cases have placed the primary emphasis on the second *Kimbell Foods* factor, the presence of conflict between the federal policy at issue and the use of state law as the rule of decision. In *O'Melveny & Myers v. FDIC*, the Supreme Court argued that cases in which the federal courts should create a federal common law rule are "'few and restricted,' limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'"¹²⁴ Subsequent Supreme Court cases have reaffirmed the importance of a "significant conflict" between state law

¹¹⁹ *Kimbell Foods*, 440 U.S. at 728 (quoting *United States v. Yazell*, 382 U.S. 341, 354 (1966)).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 729.

¹²³ *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991). For example, in the CERCLA successor liability context, the analysis should not be whether the rule of the majority of states is consistent with the federal policies underlying CERCLA. Instead, the question is whether the law of the particular state with the most significant relationship to the hazardous waste release is consistent with CERCLA policy. The Third Circuit failed to recognize this distinction in *United States v. General Battery Corp.*; the court considered general corporate law principles rather than the law of the particular state at issue. 423 F.3d 294, 300 (3d Cir. 2005); see also FALLON ET AL., *supra* note 7, at 704 (noting that federal court adopting state law may be required to analyze "the choice of which state's law governs").

¹²⁴ 512 U.S. 79, 87 (1994) (citation omitted) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963) and *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

and the federal policy at issue. Thus, "such a 'conflict' is normally a 'precondition'" for the judicial creation of a federal rule.¹²⁵

While the significant conflict requirement implies that courts should generally incorporate state law as the federal common law rule of decision, the Supreme Court has nonetheless on occasion upheld the judicial creation of a federal rule.¹²⁶ In a case involving a defective design claim arising out of a military helicopter crash, the Supreme Court held that a "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced."¹²⁷ Such a conflict existed because "uniquely federal" interests, such as the obligations and rights of the federal government under contracts as well as civil liability for individuals acting on behalf of the government, would be negatively impacted by the use of state law.¹²⁸ For example, "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts."¹²⁹

Third, the Supreme Court has recently minimized the importance of the first *Kimbell Foods* factor, i.e., the need for national uniformity. The Court noted that uniformity is the "most generic (and lightly invoked) of alleged federal interests."¹³⁰ Diversity of state law rules may

¹²⁵ *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *O'Melveny & Myers*, 512 U.S. at 87).

¹²⁶ Several cases decided before *Kimbell Foods* held that a federal rule was appropriate. See *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594-97 (1972) (rejecting use of state law as applied to federal government contracts because state law was "hostile to the interests of the United States"); *United States v. 93,970 Acres of Land*, 360 U.S. 328, 332 (1959) (creating a federal rule of decision where the application of state election of remedies law would have imposed a "Hobson's choice" on the federal government); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) ("The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."). More recently, the Supreme Court upheld the creation of a federal rule in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988).

¹²⁷ *Boyle*, 487 U.S. at 512.

¹²⁸ *Id.* at 505-06. Note that the majority suggested that a lesser conflict may justify the judicial creation of a federal rule where such unique federal interests are present. See *id.* at 507-08 ("[T]he fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." (emphasis omitted)). The federal government does not have such a unique interest in human health and land use issues, and thus this lesser conflict standard does not appear applicable to CERCLA.

¹²⁹ *Id.* at 507.

¹³⁰ *O'Melveny & Myers*, 512 U.S. at 88.

not in itself support an inference that a nationally uniform rule is necessary.¹³¹

Thus, as refined by subsequent cases, the *Kimbell Foods* analysis implies that a federal court should generally incorporate state law as the federal common law gap-filler in federal statutes.¹³² A federal court should create a federal rule only where the particular state rule significantly conflicts with the federal policies at issue.

2. The Impact of *Bestfoods* on *Kimbell Foods*

In *United States v. Bestfoods*, the Supreme Court dealt with CERCLA liability of corporate parents for the hazardous waste releases of their subsidiaries. Just as CERCLA is silent on the issue of successor liability, the statute fails to create express rules for such parent-corporation liability. However, *Bestfoods* did not apply the *Kimbell Foods* framework. As discussed below, this omission has caused much confusion in the lower federal courts.¹³³

Bestfoods involved a cost recovery action by the federal government against several parties that were potentially responsible for hazardous

¹³¹ See *Atherton v. FDIC*, 519 U.S. 213, 219-21 (1997) (arguing that divergent state law standards of corporate governance do not, in themselves, imply that nationally uniform standards are necessary under a federal banking statute).

¹³² See FALLON ET AL., *supra* note 7, at 701 (noting that *Kimbell Foods* and later cases suggest "a preference for incorporation of state law").

¹³³ See *infra* Parts II.B.3 and II.B.4. Another example of lower court difficulties following *Bestfoods* can be seen in the response of the Second Circuit to that decision. In *B.F. Goodrich v. Betkoski (Betkoski I)*, the Second Circuit created a set of federal rules for CERCLA successor liability that included the substantial continuity exception. 99 F.3d 505, 519 (2d Cir. 1996); see also *B.F. Goodrich v. Betkoski (Betkoski II)*, 112 F.3d 88, 91 (1997) (clarifying that the *Kimbell Foods* factors supported creation of a federal rule). After *Bestfoods*, in *New York v. National Services Industries (National Services Industries I)*, the Second Circuit overruled *Betkoski I*, holding that "the substantial continuity doctrine is not a part of general federal common law and, following *Bestfoods*, should not be used to determine whether a corporation takes on CERCLA liability." 352 F.3d 682, 687 (2d Cir. 2003) (emphasis added). Thus *National Services Industries I* read *Bestfoods* as requiring use of an almost pre-*Erie* general common law. Further, while *National Services Industries I* did not reconsider *Betkoski II*'s analysis of *Kimbell Foods*, the court did argue that *Bestfoods* potentially supported reversal of *Betkoski II*. See *Nat'l Servs. Indus. I*, 352 F.3d at 686 n.1 ("Because we find that . . . the substantial continuity doctrine cannot be applied, the analysis prescribed by [*Kimbell Foods*] . . . would likely come out differently now. . . . In fact, if the state had adopted the substantial continuity test . . . then the state common law might actually facilitate CERCLA's objectives." (citation omitted)). Finally, in *New York v. National Service Industries (National Service Industries II)*, 460 F.3d 201, 207-09 (2d Cir. 2006), the court strongly suggested that *Kimbell Foods* required incorporation of state law for CERCLA successor liability, but reserved the question as unnecessary to resolution of the case.

waste contamination cleaned up by the government at a site in Michigan. Two of the PRPs were allegedly liable as "owners or operators" based on the conduct of their subsidiary corporations at the site.¹³⁴ The Sixth Circuit had held that corporate parents could be liable as owners or operators based on the conduct of their subsidiaries only if the corporate veil of the subsidiary could be pierced under state law.¹³⁵ Under Michigan veil piercing law, the court held that neither parent corporation was liable under CERCLA.¹³⁶

The Supreme Court vacated the Sixth Circuit's decision. Although the language of the decision was ambiguous, the Court apparently agreed with the Sixth Circuit that a parent corporation could be held derivatively liable for the conduct of its subsidiary only where the corporate veil of the subsidiary could be pierced under state law.¹³⁷ However, the Court also held that a parent corporation may be directly liable as an "operator" under CERCLA under circumstances for which it would be inappropriate to pierce the corporate veil of the subsidiary.¹³⁸ Thus, the parent corporations at issue could be held directly liable as CERCLA "operators" of a facility owned by their sub-

¹³⁴ See *Bestfoods*, 524 U.S. at 56-58.

¹³⁵ See *United States v. Cordova Chem. Co.*, 113 F.3d 572, 580 (6th Cir. 1997) ("Whether the circumstances in this case warrant piercing of the corporate veil will be determined by state law." (citing *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1248 (6th Cir. 1991))). The Sixth Circuit rejected the district court's view that CERCLA created a new, relaxed standard of parent corporation liability. *Cordova Chem. Co.*, 113 F.3d at 579.

¹³⁶ *Id.* at 581.

¹³⁷ In a footnote, the Court noted a circuit split "over whether, in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing." *Bestfoods*, 524 U.S. at 63 n.9. The Court refused to decide the issue because no party challenged the lower court holding that neither parent was indirectly liable. *Id.* Nonetheless, other language in the opinion suggests that state law may govern the issue. See *id.* at 63 ("CERCLA is thus like many another congressional enactment giving no indication that 'the entire corpus of *state corporation law* is to be replaced simply because a plaintiff's cause of action is based upon a federal statute" (emphasis added) (quoting *Burks v. Lasker*, 441 U.S. 471, 478 (1979))); *id.* at 65 ("If any such act of operating a corporate subsidiary's facility is done on behalf of a parent corporation, the existence of the parent-subsidiary relationship under *state corporate law* is simply irrelevant to the issue of direct liability." (emphasis added) (citing *Riverside Mkt. Dev. Corp. v. Int'l Bldg. Products Inc.*, 931 F.2d 327, 330 (5th Cir. 1991))). But see *id.* at 61-62 (discussing "hornbook" principles and the "venerable common law backdrop" of corporate law).

¹³⁸ See *id.* at 65 ("The fact that a corporate subsidiary happens to own a polluting facility operated by its parent does nothing, then, to displace the rule that the parent 'corporation is [itself] responsible for the wrongs committed by its agents in the course of its business" (alteration in original) (quoting *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 395 (1922))).

subsidiary where, “in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight.”¹³⁹ The district court had failed to make findings on this issue, and thus the case was remanded.¹⁴⁰

The confusion surrounding *Bestfoods* does not reflect the preceding legal conclusions, but rather reflects the unclear mode of analysis employed by the Court. In rejecting indirect parental liability under CERCLA except where the corporate veil of the subsidiary may be pierced, the Court refused to decide whether state law or judicially created federal rules governed the veil-piercing analysis.¹⁴¹ Indeed, the Court ambiguously referred both to “state corporation law”—suggesting that state law governed—and the “venerable common law backdrop,” suggesting that federal judges were free to fashion federal rules.¹⁴² Similarly, in its discussion of direct CERCLA “operator” liability for parent corporations, the Court claimed to engage in straightforward statutory construction of the term “operator,”¹⁴³ but at the same time referred to general “norms” of corporate law in construing that term.¹⁴⁴

Thus, *Bestfoods* involved a very similar issue to *Kimbell Foods*: congressional silence on an issue necessary to the functioning of a federal statute. However, *Bestfoods* did not apply, or even mention, the *Kimbell Foods* framework. Indeed, the Court failed to provide any guidance whatsoever to the lower federal courts. For example, does *Bestfoods* imply that CERCLA is different than the federal liens at issue in *Kimbell Foods*, such that the latter does not apply to the CERCLA context? If *Kimbell Foods* does apply to CERCLA, how should that analysis be resolved?

As an initial matter, nothing in *Bestfoods* suggests that CERCLA deserves special rules of construction.¹⁴⁵ Indeed, *Bestfoods* should be seen

¹³⁹ *Id.* at 72.

¹⁴⁰ *Id.* at 72-73.

¹⁴¹ *See id.* at 63 n.9.

¹⁴² *See supra* note 135.

¹⁴³ *See Bestfoods*, 524 U.S. at 71.

¹⁴⁴ *See id.* at 71-72.

¹⁴⁵ Indeed, the tenor of the opinion is that CERCLA does not displace any legal rules unless Congress explicitly provided for such a result. *See id.* at 63-64 (“[T]he failure of [CERCLA] to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rules that ‘[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.’” (second alteration in original) (quoting *United States v. Texas*, 507 U.S. 529, 539 (1993))).

as an anomalous departure from the post-*Kimbell Foods* federal common law doctrine. Most basically, *Bestfoods* develops no alternative vision for determining when it is appropriate for the federal judiciary to create federal common law rules that displace state law. *Bestfoods* may suggest that Congress must expressly provide a federal rule if it intends to displace state law—implying that federal statutory gaps should always be filled with state law.¹⁴⁶ However, that reading is fundamentally undermined by the Court's repeated reliance on "horn-book" principles of corporate law. Indeed, *Bestfoods* made not even a single reference to Michigan law.

In summary, *Bestfoods* should be seen as a ticket good for one ride only. Unless and until the Supreme Court develops an alternative vision to federal common law-making, *Kimbell Foods* and its progeny remain the only principled basis for determining whether federal common law should incorporate state law or judicially created federal rules of decision.

3. Federal Common Law Circuits

As noted above, the Third, Fourth, and Eighth Circuits have approved the judicial creation of federal rules to fill CERCLA's successor liability gap.¹⁴⁷ Early decisions by these circuits generally failed to apply the *Kimbell Foods* analysis.¹⁴⁸ For example, in *United States v. Carolina Transformer Co.*, the Sixth Circuit simply assumed that Congress intended for the federal courts to supply a federal rule that would broadly construe CERCLA's remedial scheme.¹⁴⁹ Similarly, in *United States v. Mexico Feed & Seed Co.*, the Eighth Circuit simply stated that "considering the national application of CERCLA and fairness to similarly situated parties, the district court was probably correct in applying federal law."¹⁵⁰ These decisions held that, given the broad reme-

¹⁴⁶ See *supra* note 145.

¹⁴⁷ See *supra* notes 104-106 (collecting cases).

¹⁴⁸ See Rosenberg, *supra* note 26, at 470 (noting that the "federal courts failed to apply the *Kimbell Foods* three-part test" to questions of CERCLA successor liability).

¹⁴⁹ See 978 F.2d 832, 837-38 (4th Cir. 1992) ("In adopting a rule of successor liability . . . we must consider traditional and evolving principles of federal common law, 'which Congress has left to the courts to supply interstitially.'" (quoting *United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988))).

¹⁵⁰ 980 F.2d 478, 487 n.9 (8th Cir. 1992).

dial purposes of CERCLA, the substantial continuity exception to asset purchaser nonliability was appropriate under federal common law.¹⁵¹

These cases were decided before *O'Melveny & Myers* and *Atherton*.¹⁵² More recently, the Third Circuit applied *Kimbell Foods* and its progeny to the question of CERCLA successor liability, holding that federal law provided the applicable rule of decision.¹⁵³

Importantly, the Third Circuit had previously decided, without explicitly applying *Kimbell Foods*, that judicially created federal rules governed CERCLA successor liability.¹⁵⁴ Thus, the court asked whether *O'Melveny & Myers* and *Atherton* required an overruling of that earlier case, and held that they did not.¹⁵⁵ However, unlike the courts in *Mexico Feed* and *Carolina Transformer*, the Third Circuit held that federal law included only those exceptions recognized by a majority of states—that is, the traditional exceptions.¹⁵⁶

First, in *General Battery Corp.*, the Third Circuit distinguished *O'Melveny & Myers* and *Atherton* because the latter two cases dealt with federal banking statutes.¹⁵⁷ Thus, those Supreme Court cases did not explicitly address CERCLA or overrule *Smith Land*.

Moreover, the panel noted the Supreme Court decision in *United States v. Bestfoods*,¹⁵⁸ which addressed the related question of CERCLA

¹⁵¹ See *Mex. Feed & Seed Co.*, 980 F.2d at 488 (“[I]n the CERCLA context, the imposition of successor liability under the ‘substantial continuation’ test is justified by a showing that in substance . . . the successor is a responsible party. The cases . . . have correctly focused on preventing those responsible for the wastes from evading liability through the structure of subsequent transactions.”); *Carolina Transformer*, 978 F.2d at 840-41 (holding that, in light of CERCLA’s broad remedial goals, the district court appropriately applied the substantial continuity exception to hold defendant liable as a successor corporation).

¹⁵² See *supra* Part II.B.1 (discussing *Kimbell Foods* and its progeny). Note, however, that even after these Supreme Court decisions, the courts of appeals did not consistently analyze CERCLA successor liability under the *Kimbell Foods* framework. See, e.g., *B.F. Goodrich v. Betkoski (Betkoski I)*, 99 F.3d 505, 514 (2d Cir. 1996) (holding, without applying *Kimbell Foods* and its progeny, that federal law governed CERCLA successor liability and included the substantial continuity exception), *abrogated by New York v. Nat’l Serv. Indus. (Nat’l Serv. Indus. II)*, 460 F.3d 201, 207 (2d Cir. 2006).

¹⁵³ *United States v. Gen. Battery Corp.*, 423 F.3d 294, 298-99 (3d Cir. 2005).

¹⁵⁴ See *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988) (applying “[t]he general doctrine of successor liability in operation in most states” through federal common law rulemaking).

¹⁵⁵ *Gen. Battery Corp.*, 423 F.3d at 303-04.

¹⁵⁶ *Id.* at 304.

¹⁵⁷ *Id.* at 299-300.

¹⁵⁸ 524 U.S. 51 (1998). While the Third Circuit’s characterization of *Bestfoods* is accurate, that case is an outlier in the Supreme Court’s federal common law jurisprudence. See *supra* Part II.B.2 (arguing that *Bestfoods* is inconsistent with *Kimbell Foods*).

liability for parent corporations based on the conduct of their subsidiaries.¹⁵⁹ In that case, the Court noted, but declined to resolve as unnecessary to its decision, a circuit split over whether CERCLA incorporated state law for indirect corporate liability.¹⁶⁰ Moreover, according to the Third Circuit, “*Bestfoods* applied ‘fundamental’ and ‘hornbook’ principles of indirect corporate liability, not the law of any particular state.”¹⁶¹ Thus, *Bestfoods* implicitly supported the use of uniform federal rules for CERCLA successor liability rather than incorporation of state law.¹⁶² However, those federal rules should include only “fundamental” principles recognized by a majority of states.¹⁶³

The Third Circuit also argued that the first and third *Kimbell Foods* factors supported the use of federal common law based on the law of the majority of states. First, CERCLA required a nationally uniform federal rule. In light of state law variation of successor liability rules, the panel “doubt[ed] [that] Congress intended to incorporate such variations under a comprehensive federal liability statute.”¹⁶⁴ Moreover, “uniform and predictable federal liability standard[s] correspond[] with specific CERCLA objectives by encouraging settlements and facilitating a more liquid market in corporate and ‘brownfield’ assets.”¹⁶⁵

Additionally, a nationally uniform rule based on “the ‘majority’ standard . . . accords respect to existing commercial relationships predicated on the majority state law, while ensuring that responsible

¹⁵⁹ See *K.C.1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1021-22 (“We acknowledge that the continuing viability of the substantial continuity theory . . . as a creation of federal common law has been seriously questioned following the Supreme Court’s pronouncement in *Bestfoods* that nothing in CERCLA purports to rewrite the settled rules of state corporation law . . .”). Of course, *Bestfoods* did not “pronounce” any such rule at all. See *supra* Part II.B.2 (noting that *Bestfoods* is ambiguous as to whether CERCLA incorporates state law or mandates adoption of federal common law rules).

¹⁶⁰ *Bestfoods*, 524 U.S. at 63 n.9.

¹⁶¹ *Gen. Battery Corp.*, 423 F.3d at 300.

¹⁶² *Id.*

¹⁶³ See *id.* at 304 (stating that “CERCLA’s goal of minimizing litigation and transaction costs is ill-served by a case-by-case approach” that looks to the law of a particular state).

¹⁶⁴ *Id.* at 302.

¹⁶⁵ *Id.* In support of this argument, the panel cited 42 U.S.C. § 9622(a) (2000), which encourages settlements “in order to expedite effective remedial actions.” The panel also cited 42 U.S.C. § 9607(r) (Supp. IV 2004), a part of the “Brownfield Amendments” to CERCLA that encourages redevelopment of potentially contaminated property, i.e. brownfields. See Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified as amended in scattered sections of 42 U.S.C. §§ 9601–9622 (2000 & Supp. IV 2004)).

parties . . . contribute their fair share to the cleanup of hazardous waste under the federal program."¹⁶⁶ Thus, according to the panel, the third *Kimbell Foods* factor also supported judicial creation of a federal rule.

In summary, several early courts of appeals decisions adopted federal common law rules in CERCLA successor liability cases. While these decisions appropriately argued that the modern exceptions to asset purchaser nonliability may be consistent with CERCLA,¹⁶⁷ they are fatally flawed insofar as they did not analyze the issue through the *Kimbell Foods* framework.

More recently, however, the Third Circuit employed the *Kimbell Foods* framework to hold that CERCLA successor liability should be governed by judicially created federal rules that include only the traditional exceptions to asset purchaser nonliability.¹⁶⁸ However, the Third Circuit's analysis was contrary to the Supreme Court decisions that built on *Kimbell Foods*.¹⁶⁹ The Third Circuit refused to analyze the law of the particular state at issue, instead placing undue significance on *Bestfoods* and the Supreme Court's use of "hornbook" corporate law principles.¹⁷⁰ That is, even though *Bestfoods* explicitly reserved the question of whether state law or judicially created federal rules governed parent corporation liability under CERCLA, the Third Circuit inappropriately read the case as mandating the creation of federal rules of decision on successor liability.¹⁷¹ Finally, the Third Circuit

¹⁶⁶ *Gen. Battery Corp.*, 423 F.3d at 303 (citations omitted).

¹⁶⁷ See *infra* Parts III.B.1, IV.B (arguing that the modern exceptions are not in conflict with CERCLA policies).

¹⁶⁸ See *Gen. Battery Corp.*, 423 F.3d at 305 ("CERCLA incorporates, but does not expand upon, 'fundamental' common law principles of indirect corporate liability.").

¹⁶⁹ As a matter of authority, the Third Circuit probably did have the competence to judicially create a federal rule of decision to govern the federal common law of CERCLA successor liability. Just as the rights and obligations of the federal government in *Kimbell Foods* arose because of federal law, so too are the rights and obligations of CERCLA PRPs created by federal law. However, as a matter of discretion, the *Kimbell Foods* analysis suggests that the Third Circuit should not have displaced state successor liability rules.

¹⁷⁰ See *Gen. Battery Corp.*, 423 F.3d at 312 (Rendell, J., dissenting) ("[W]e are not to evaluate the jurisprudential landscape of all fifty states; rather, 'federal courts should incorporate state law . . . unless the particular state law in question is inconsistent with the policies underlying the federal statute.'" (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991))).

¹⁷¹ More generally, *Bestfoods* cannot bear the analytic weight thrust upon it by the *General Battery* majority. As noted in previously, *Bestfoods* was an aberrant case in the Supreme Court's federal common law jurisprudence. See *supra* Part II.B.2. To read that case as requiring (1) creation of federal common law rules that (2) contain only

emphasized national uniformity rather than the presence of a significant conflict between CERCLA and use of state law as the rule of decision for successor liability.¹⁷²

4. State Law Circuits

The First, Second, Sixth, and Eleventh Circuits have incorporated state law as the rule of decision for CERCLA successor liability.¹⁷³ Additionally, the Ninth Circuit has questioned, but not explicitly overruled, an earlier decision that adopted judicially created federal rules.¹⁷⁴

Just as early decisions creating a federal common law rule failed to analyze CERCLA successor liability under *Kimbell Foods*, so too did early decisions incorporating state law omit the *Kimbell Foods* analysis.¹⁷⁵ For example, in *Anspec Co. v. Johnson Controls, Inc.*, the Sixth Circuit held that CERCLA incorporated state successor liability law as a matter of statutory interpretation.¹⁷⁶

However, recent cases incorporating state successor liability law into CERCLA have applied *Kimbell Foods* and its progeny.¹⁷⁷ Generally, these courts have emphasized arguments pointing to a lack of significant conflict between CERCLA and state successor liability rules.¹⁷⁸

"traditional" or "fundamental" corporate law doctrines is therefore unwarranted—especially since *Bestfoods* may have contemplated incorporation of state corporate law. See *supra* note 137.

¹⁷² *Gen. Battery Corp.*, 423 F.3d at 302.

¹⁷³ See *supra* notes 107-110.

¹⁷⁴ See *supra* note 111.

¹⁷⁵ See Rosenberg, *supra* note 26, at 483-91.

¹⁷⁶ 922 F.2d 1240, 1246-48 (6th Cir. 1991). This result was affirmed without elaboration by a subsequent Sixth Circuit case. See *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994) ("In *Anspec*, we held that a state's law on corporations, including that state's law on mergers and successor liability, applied in determining whether a successor corporation would be liable under CERCLA for cleanup costs.").

¹⁷⁷ See Rosenberg, *supra* note 26, at 491-99.

¹⁷⁸ See *New York v. Nat'l Serv. Indus. (Nat'l Serv. Indus. II)*, 460 F.3d 201, 208 (2d Cir. 2006) (noting that the parties pointed "to no conflict between the application of state law and the federal interests at issue in CERCLA, and we fail to see one"); *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001) ("We see no evidence that application of state law to the facts of this case would frustrate any federal objective."); *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 364 (9th Cir. 1998) ("There is no evidence that the application of state corporation law will frustrate [CERCLA's] objective [of holding responsible parties liable]."); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1502 (11th Cir. 1996) ("[S]tate rules permit plaintiffs to hold limited partners accountable for a partnership's CERCLA liability under certain circumstances," and there is no evidence that states will "enact[] more protective statutes . . . to defeat CERCLA's goal of having the polluter pay.").

Absent that type of a significant conflict, these circuits have held that *O'Melveny & Myers* and *Atherton* require incorporation of state law.

Moreover, again consistent with Supreme Court precedent, these circuits have reduced emphasis on national uniformity. As noted by the Second Circuit, "[a]lthough CERCLA is a federal statute for which there is presumably an interest in uniform application, . . . 'a mere federal interest in uniformity is insufficient to justify displacing state law in favor of a federal common law rule.'"¹⁷⁹

However, the decisions that incorporate state successor liability rules into CERCLA have held that only the traditional exceptions to asset purchaser nonliability are applicable—even where the law of the state at issue recognizes the broader modern exceptions. For example, *City Management Corp. v. U.S. Chemical Co.* dealt with an asset purchase involving two Michigan corporations; the seller was a potentially responsible party under CERCLA on the basis of its transportation of hazardous solvents to a Michigan landfill.¹⁸⁰ There was no continuity of ownership between the seller and purchaser. Thus, the traditional mere continuation and de facto merger exceptions to asset purchaser nonliability were not applicable against the purchaser.¹⁸¹ However, Michigan products liability law recognized the broader substantial continuity exception.¹⁸² Nonetheless, the Sixth Circuit concluded—without analyzing the similarities or differences of the public policies underlying CERCLA and products liability cases—that "it seems clear from the reasoning . . . of the [Michigan Supreme Court's] opinion that the expanded *Turner* exception is limited to products liability cases."¹⁸³

In summary, these cases have appropriately applied the *Kimbell Foods* analysis—as refined by subsequent Supreme Court decisions—to hold that, in the absence of a significant conflict between CERCLA and state successor liability law, CERCLA incorporates those state law rules. However, the cases have narrowly construed state successor liability law—arguably without sufficient analysis of the underlying poli-

¹⁷⁹ *Nat'l Serv. Indus. II*, 460 F.3d at 208 (quoting *B.F. Goodrich v. Betkoski (Betkoski II)*, 112 F.3d 88, 91 (2d Cir. 1997)); see also *Redwing Carriers*, 94 F.3d at 1501 ("Adopting a uniform rule would, perhaps, expedite enforcement of CERCLA by decreasing uncertainty in assessing liability . . . But this argument could be made for adopting a uniform rule in the context of just about any federal statute.").

¹⁸⁰ See 43 F.3d at 246-47.

¹⁸¹ *Id.* at 251-53.

¹⁸² See *id.* at 251 (citing *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 892 (Mich. 1976)); see also *infra* Part III.B.1 (arguing that the modern exceptions should be extended from the products liability context to CERCLA cases).

¹⁸³ *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 252 (6th Cir. 1994).

cies of those state rules—so that only the traditional exceptions apply under CERCLA.

III. CHOICE OF LAW ONE: WHICH STATE LAW?

Asset purchaser liability under CERCLA should be governed by judicially created federal rules, under *Kimbell Foods* and its progeny, only if state law significantly conflicts with the federal policies embodied by CERCLA.¹⁸⁴ Importantly, the decisions incorporating state successor liability rules into CERCLA generally have not dwelt long on the question of the appropriate state law. For example, does the law of the state of incorporation or the law of the state of hazardous release govern if they differ?¹⁸⁵ Moreover, the federal courts that have addressed this subsidiary choice of law issue have failed to reach consistent results.¹⁸⁶

This conflict of state law problem (where present) must be resolved prior to application of the *Kimbell Foods* test.¹⁸⁷ As discussed below, the law of the state in which the hazardous waste release occurs will govern successor liability issues.¹⁸⁸

¹⁸⁴ See *supra* Part II.B.1.

¹⁸⁵ Indeed, many of the cases do not even specify whether the state of incorporation differs from the state in which the hazardous release occurred. In part, this may be because the states of incorporation and release (or at least their laws) were identical. But, given that a majority of large public corporations are incorporated under Delaware law but conduct business in other states, see *supra* Part II.A.3, the state of incorporation and release often differ. Additionally, the courts may have failed to address this issue because most have assumed that successor liability law is largely uniform. See, e.g., *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1249 (6th Cir. 1991) (“[T]he law in the fifty states on corporate dissolution and successor liability is largely uniform.”). However, as Part II.A.2 demonstrates, a substantial minority of states has adopted nontraditional rules, including several important states (e.g., California, Delaware, Michigan, New Jersey) that have expanded or contracted the traditional exceptions to asset purchaser nonliability. So, for example, it may not be uncommon for a corporation to be incorporated under Delaware law—with its narrow exceptions—while operating in California—with its expanded, modern exceptions.

¹⁸⁶ See *supra* note 17.

¹⁸⁷ See *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108-09 (1991) (“[F]ederal courts should incorporate state law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute.” (second emphasis added)).

¹⁸⁸ See *infra* Part IV.

A. Which Conflict of Laws Principles?

Before resolving a conflict of substantive state successor liability rules, a federal court engaged in federal common law rulemaking first must determine which choice of law principles should apply.¹⁸⁹ Again, the federal courts are split. Some courts follow the approach of *Klaxon Co. v. Stentor Electric Manufacturing Co.*,¹⁹⁰ and thus apply the choice of law rules of the forum state.¹⁹¹ Others create federal rules to govern the choice of law issue.¹⁹²

Fortunately, this is one conflict of laws question that normally will not require an answer, at least for CERCLA successor liability. Most American jurisdictions use either "traditional" conflict of laws principles¹⁹³ or a variant of modern theory that looks to some combination of the states' relationships to, and their interests in, the legal controversy.¹⁹⁴ Under either approach, the law of the state in which the hazardous release occurred will govern CERCLA successor liability.

Under traditional conflict of laws principles, torts are governed by the law of the place in which the injury occurred.¹⁹⁵ CERCLA liability has been characterized as analogous to tort liability,¹⁹⁶ and thus, under traditional conflict of laws principles, the law of the state in which the hazardous waste release occurred will govern. Similarly, as demonstrated in the next section, the most significant relationship and interest analysis approaches to conflict of laws also suggest that the law of the state where a hazardous release occurred controls questions of CERCLA successor liability. Simply stated, the state in which the haz-

¹⁸⁹ See FALLON ET AL., *supra* note 7, at 704 (presenting the alternative approaches available to federal courts facing questions about which state's law to apply).

¹⁹⁰ 313 U.S. 487 (1941).

¹⁹¹ FALLON ET AL., *supra* note 7, at 704 n.10. *Klaxon* did not involve federal common law rulemaking, but rather held that a federal court sitting in diversity should apply the conflict of laws principles of the forum state. See *Klaxon Co.*, 313 U.S. at 496 ("It is not for the federal courts to thwart . . . local policies by enforcing an independent 'general law' of conflict of laws.").

¹⁹² FALLON ET AL., *supra* note 7, at 704 n.10 (citing *Richards v. United States*, 369 U.S. 1 (1962) as an example in which the choice of law rules from the state of injury governed).

¹⁹³ See LEA BRILMAYER & JACK GOLDSMITH, *CONFLICT OF LAWS: CASES AND MATERIALS* 1 (5th ed. 2002) (noting that about ten states use the traditional conflict of laws rules).

¹⁹⁴ See *id.* at 278 (noting that twenty-two states have adopted the most significant relationship approach to conflict of laws); see also DAVID D. SIEGEL, *CONFLICTS IN A NUTSHELL* § 79, at 246 (2d. ed. 1994) (arguing that the Second Restatement and interest analysis approaches "involve the same ingredients, and . . . ought to reach the same results").

¹⁹⁵ See RESTATEMENT OF CONFLICT OF LAWS § 378 (1934).

¹⁹⁶ See, e.g., *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001).

ardous release occurs will have a greater connection to and interest in a CERCLA case than will the state of incorporation.

Thus, unless a federal court intends to develop a novel conflict of laws approach for CERCLA successor liability issues, the courts will not face serious difficulty on this point. The dominant approaches to conflict of laws within the United States all point to the same result. In light of the ascendancy of the modern approaches to conflict of laws, the next sections more fully analyze successor liability conflicts under those approaches.

B. *Modern Conflict of Laws Principles*

Modern conflict of laws approaches generally consider both the contacts with, and substantive policies of, the interested states to the case at issue.¹⁹⁷ Under these approaches, the law of the state in which the hazardous release occurred should govern.

1. Characterization

CERCLA successor liability for asset purchasers stands at the intersection of corporate, tort, and contract law. The manner in which a court characterizes this issue may have important consequences under modern conflict of laws principles. In the end, tort conflict of laws principles should govern CERCLA cases in which the law of the state of incorporation and hazardous release differ.

If the court characterizes the conflict as one related to corporate governance, the internal affairs doctrine may govern the conflicts analysis. Under the internal affairs doctrine, matters of internal corporate governance are generally governed by the law of the state of incorporation.¹⁹⁸ Moreover, according to the Second Restatement, issues involving rights and liabilities that only corporations may obtain are generally governed by the law of the state of incorporation.¹⁹⁹ Successor liability, at least arguably, is unique to corporations (and

¹⁹⁷ See SIEGEL, *supra* note 194, at 246 (arguing that the Second Restatement and interest analysis approaches "involve the same ingredients, and . . . ought to reach the same results").

¹⁹⁸ See EISENBERG, *supra* note 55, at 107 ("Under traditional choice-of-law rules, . . . a corporation's internal affairs are governed by the law of its state of incorporation . . .").

¹⁹⁹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971).

other business organizations) such that the law of the state of incorporation should govern.²⁰⁰

However, characterizing CERCLA successor liability as a corporate law issue (for conflict of laws purposes) is inappropriate. The internal affairs doctrine focuses primarily on issues related to the allocation of power and rights within the corporation. Clearly, CERCLA successor liability deals with very different problems. Notably, the party seeking recovery against the alleged successor corporation (e.g., the government or another responsible party) is an external actor.²⁰¹ Similarly, while successor liability may be unique to corporations and other business organizations, CERCLA liability itself is not.²⁰² Finally, even if the issue was framed in terms of corporate law, the court may nonetheless apply the law of a state other than the state of incorporation if the "other state has a more significant relationship to the occurrence and the parties."²⁰³ As argued below, the state in which the hazardous release occurred generally will have a more significant relationship.

Thus, the internal affairs doctrine should not govern conflicts related to CERCLA successor liability.²⁰⁴ Moreover, tort—rather than contract—conflict of laws principles should govern successor liability under the statute. First, CERCLA liability has been characterized as a tort in other circumstances.²⁰⁵ Second, the exceptions to asset pur-

²⁰⁰ See *Chrysler Corp. v. Ford Motor Co.*, 972 F. Supp. 1097, 1102 (E.D. Mich. 1997) ("[I]t could also be argued that [theories of] successor liability . . . are theories of liability peculiar to corporations, in which case § 302 applies.").

²⁰¹ As the court noted in *Chrysler*,

A single CERCLA lawsuit may adjudicate the claims of a large number of actors [The parties that] seek to recover from [the alleged successor] did not organize their relationship under the umbrella of the incorporating state's law, as would be the case in an internal dispute The interests here go far beyond corporate governance [and] affect a wide range of interests outside the corporation.

Id. at 1103.

²⁰² See *id.* at 1102 ("A non-corporate entity may accrue CERCLA liability, and on that basis § 301 would appear to apply here, leading to the application of normal contract or tort choice of law rules.").

²⁰³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (1971).

²⁰⁴ See *id.* § 301 ("The rights and liabilities of a corporation with respect to a third person that arise from a corporate act of a sort that can likewise be done by an individual are determined by the same choice-of-law principles as are applicable to non-corporate parties.").

²⁰⁵ See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160, 171-72 (4th Cir. 1988) (analogizing CERCLA liability in cases involving multiple responsible parties to "indivisible harms" resulting from common law torts to support imposition of joint and several liability on such responsible parties).

chaser nonliability do not generally relate to the terms of any contractual agreement between the buyer and seller.²⁰⁶ That is, CERCLA successor liability actions do not involve claims for breach of contract by either party; similarly, they generally do not contest the validity or interpretation of the asset purchase agreement.²⁰⁷

Finally, courts dealing with asset purchaser successor liability in other contexts generally characterize the case, for conflicts purposes, in terms of the substantive law underlying the claim rather than as a contract case. For example, in cases involving claims of products liability against an asset purchaser based on the conduct of the seller, courts look to tort conflict of laws principles.²⁰⁸

2. Modern Approaches to Torts

Under modern conflict of laws doctrine as applied to tort, two principle approaches have emerged.²⁰⁹ First, under the Second Restatement approach adopted by the majority of states,²¹⁰ the state with

²⁰⁶ However, a case involving the expressed or implied assumption of liability theory of successorship may involve contract law issues. See, e.g., *Chrysler*, 972 F. Supp. at 1104 (“[T]heories based on contractual or quasi-contractual assumption of liability would seem to invoke the provisions of [Restatement (Second) of Conflict of Laws] § 188, which specifies factors to be considered in contract actions in the absence of effective choice of law by the parties.”).

²⁰⁷ Cf. *Federated Rural Elec. Ins. Exch. v. R.D. Moody & Assocs., Inc.*, 468 F.3d 1322, 1325-26 (11th Cir. 2006) (characterizing a subrogation claim as a tort action, rather than a contract action, for choice of law purposes because the claim did not seek to recover for breach of contract or to dispute the “validity, nature, construction, or interpretation” of any contract).

²⁰⁸ See, e.g., *Page v. Gulf Oil Co.*, 812 F.2d 249, 250 (5th Cir. 1987) (holding that a clause in an asset purchase agreement requiring use of California law for contract disputes between asset purchaser and seller did not extend to incorporate California successor liability law in products liability actions); *Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977) (arguing for tort conflict of laws principles in a products liability case against a successor corporation—even though the asset purchase agreement stipulated use of Ohio law—because products liability raises issue outside the contract); *Hoover v. Recreation Equip. Corp.*, 792 F. Supp. 1484, 1490-91 (N.D. Ohio 1991) (applying tort conflict of laws principles to a products liability case against a successor corporation).

²⁰⁹ These approaches are supplemented by several others, including, most prominently, the “better rule of law” test under which courts, in their view, apply the law of the state offering the most appropriate substantive legal principles. See, e.g., *Milkovich v. Saari*, 203 N.W.2d 408, 417 (Minn. 1973) (applying Minnesota law after concluding that “we are firmly convinced of the superiority of the [Minnesota] common-law rule of liability to that of the Ontario guest statute”).

²¹⁰ See BRILMAYER & GOLDSMITH, *supra* note 193, at 278 (“The Second Restatement is by far the most popular choice-of-law methodology . . .”).

the most significant relationship to the occurrence and parties provides the substantive legal principles. The Second Restatement provides that several criteria are generally relevant to the choice of law inquiry:

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of the other interested states and the relative interests of those states . . . , (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.²¹¹

These criteria suggest that the court is to engage in "policy analysis" within the conflict of laws inquiry.²¹² However, the Restatement also provides for analysis of the contacts of the states with the legal issue. Thus, the court is to take into account "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."²¹³ Finally, the most significant relationship analysis applies to each legal issue in a case.²¹⁴ In sum, the Restatement approach is flexible and considers the totality of the contacts and interests of the conflicting states as applied to each legal issue.²¹⁵ Other courts engage in interest analysis. Under that approach, courts look to the underlying policies of the conflicting state laws at issue and, if a true conflict exists, often apply the law of the state whose policies would be most impaired by rejection of its rules.²¹⁶

Essentially, the first step in interest analysis is the determination of whether a true conflict exists. For a true conflict to exist, the states

²¹¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

²¹² BRILMAYER & GOLDSMITH, *supra* note 193, at 263.

²¹³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

²¹⁴ See SIEGEL, *supra* note 194, at 239. Thus, a court may apply the law of one state to legal issue X, but the law of another state to legal issue Y, depending on the relationships of the two states to each issue within the case.

²¹⁵ See BRILMAYER & GOLDSMITH, *supra* note 193, at 264 ("Because of the Second Restatement's eclecticism, courts have done many different things under its banner. Sometimes they count contacts[;] . . . sometimes they perform interest analysis; often they mix several different approaches.").

²¹⁶ See *Bernhard v. Harrah's Club*, 546 P.2d 719, 723 (Cal. 1976) ("Once . . . a true conflict of the governmental interests involved as applied to the parties under the particular circumstances of the case [has been identified], the 'comparative impairment' approach . . . seeks to determine which state's interest would be more impaired if its policy were subordinated to . . . the other state.").

must have differing rules of law; each must also have an interest favoring the application of its law to the particular case. However, there is no true conflict where "two competing rules have different instructions, and literally applied would lead to different results, but . . . analysis of the policies underlying the rules shows that one of them was not aimed at the particular situation despite its facial content."²¹⁷

Second, if a true conflict is found, the court often seeks to resolve the conflict "by applying the law of the state whose interest would be the more impaired if its law were not applied."²¹⁸ This comparative impairment test does not "'weigh' the conflicting governmental interests . . . [to determine which is] the 'better' or the 'worthier' social policy."²¹⁹ Instead, "emphasis is placed on the appropriate scope of conflicting state policies rather than on the 'quality' of those policies."²²⁰

In summary, the modern approaches to conflict of laws focus on substantially similar factors—the policies, interests, and overall relationship of the conflicting jurisdictions to the dispute. Indeed, as described below, both approaches suggest that the law of the state of hazardous release usually should govern for CERCLA successor liability.

C. Resolution: Law of the State of Hazardous Release

Application of the preceding choice of law principles to a specific case obviously requires a court to consider the law of the particular states implicated in the conflict. Nonetheless, the state in which the hazardous waste release occurs generally will have the most significant relationship to, and the greatest interest in, the question of CERCLA successor liability.

As described in Part II.A, the states can be divided into three classes based on their application of successor liability rules to asset purchasers: (1) traditional exception states, (2) traditional plus modern exception states, and (3) Delaware, which does not even recognize all the traditional exceptions. Thus, there are two basic conflict

²¹⁷ SIEGEL, *supra* note 194, at 254. In these situations, the court may resolve an otherwise apparent conflict by reexamining the policy of the states to "determine if a more restrained interpretation" that avoids the conflict "is more appropriate." *Bernhard*, 546 P.2d at 723.

²¹⁸ *Bernhard*, 546 P.2d at 723.

²¹⁹ *Id.* (internal quotation marks omitted) (quoting Harold W. Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 UCLA L. REV. 719, 753 (1974)).

²²⁰ *Id.* at 724 (alteration in original omitted) (internal quotation marks omitted) (quoting Horowitz, *supra* note 219, at 753).

scenarios. First, the successor liability law of the state of incorporation may recognize fewer exceptions to asset purchaser nonliability than does the law of the state of hazardous release.²²¹ Conversely, the law of the state of incorporation may recognize more exceptions to asset purchaser liability than that of the state of release.²²²

1. False Conflict?

As an initial matter, a conflict between a state recognizing the modern exceptions and a state limited to the traditional (or Delaware) exceptions may, facially, appear to be a false conflict. The modern exceptions were developed to address the policies of strict products liability.²²³ Thus, the scope of the modern exceptions, arguably, could be limited to that specific context.²²⁴ There would be no conflict between modern and traditional states in the CERCLA successor liability context.

However, this "false conflict" analysis should be rejected. Most basically, the policy considerations that led certain states to adopt the modern exceptions to asset purchaser liability for strict products liability resonate in the CERCLA context.²²⁵

²²¹ This would include the following situations: (1) the state of incorporation recognizes traditional exceptions but the state of release recognizes modern exceptions, (2) the state of incorporation is Delaware and the state of release recognizes traditional exceptions, and (3) the state of incorporation is Delaware and the state of release recognizes modern exceptions.

²²² This would include the following situations: (1) the state of incorporation recognizes traditional exceptions and the state of release is Delaware, (2) the state of incorporation recognizes modern exceptions and the state of release is Delaware, and (3) the state of incorporation recognizes modern exceptions but the state of release recognizes only traditional exceptions.

²²³ See *supra* Part II.A.2 (recognizing that the products liability exception prioritizes the policy aims of strict products liability over traditional corporate law concerns).

²²⁴ The Sixth Circuit has implicitly accepted this argument. See *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 252-53 (6th Cir. 1994) (rejecting application of Michigan's substantial continuity exception to CERCLA successor liability).

²²⁵ See Kenneth K. Kilbert, *Successor Liability Under CERCLA: Whither Substantial Continuity?*, 14 PENN. ST. ENVTL. L. REV. 1, 9-10, 20-21 (2005) (arguing that the substantial continuity exception may be applied under CERCLA); Daniel H. Squire, William P. Ingram & Don J. Frost, Jr., *Corporate Successor Liability Under CERCLA: Who's Next?*, 43 SW. L.J. 887, 906 (1990) (noting that the Department of Justice argued that the use of modern exceptions is appropriate under CERCLA based on cost-shifting arguments similar to risk-spreading in the products liability context). But see Schnapf, *supra* note 10, at 457 (noting that the existence of the Superfund may mean that "the policy justifications outlined in the product line cases do not apply under CERCLA").

For example, the California Supreme Court provided three justifications for adopting the products line exception: (1) the asset purchaser may assume the original manufacturer's risk-spreading role, (2) the asset sale may destroy the plaintiff's remedy against the original manufacturer, and (3) fairness requires that the buyer must take the bad consequences of its purchase with the good.²²⁶ These justifications support imposition of CERCLA liability on asset purchasers.

First, for products liability, risk-spreading justification assumes that the manufacturer is in the best position to internalize the cost of risks.²²⁷ A corporation that purchases the assets of another party that has caused some harm, whether in a products liability or hazardous contamination case, should bear the potential associated liability. In both situations, the asset purchaser has unique incentives to discover, and minimize the impact of, harm to society caused by the seller.²²⁸ It is no answer to say that the asset purchaser did nothing wrong; both CERCLA and strict products liability apply without fault.²²⁹ Second, if the seller dissolves after the asset sale, any CERCLA remedy against that party may be destroyed.²³⁰ Third, the fairness considerations identified in the products context—most importantly, the fact that the purchaser benefits from the goodwill of the seller—are equally applicable to CERCLA liability.

²²⁶ See *supra* notes 82-85 and accompanying text (identifying three justifications for the products line exception).

²²⁷ See W. Page Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 408 (1970) (arguing that risks created by the manufacturer "should be a cost of doing business").

²²⁸ Some commentators argue that products liability may be distinguished from hazardous contamination cases because an asset purchaser cannot generally obtain insurance against CERCLA liability. Schnapf, *supra* note 10, at 457-58 (noting that the insurance policies that serve to limit environmental liability may not be accessible to successor corporations). However, insurance may be obtained "to minimize the environmental liability associated with a transaction and to cover the risks of cost overruns during site cleanups." *Id.* at 458 n.124.

²²⁹ Indeed, some courts have gone so far as to conclude that, based on the statutory definition of responsible parties, CERCLA does not even require a showing of causation. See *Atl. Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1285 (E.D. Pa. 1994) ("[C]oncern with traditional tort principles of causation is not evident in CERCLA.").

²³⁰ A party seeking recovery under CERCLA may be able to collect against a dissolved corporation, but such an action is riddled with difficulties. See Schnapf, *supra* note 10, at 458 & nn.126-27. On the other hand, the Superfund may provide financing at sites for which the responsible party cannot be held liable.

Additionally, as noted in the substantial continuity cases, the form of the corporate transaction does not matter to the injured party.²³¹ Indeed, in both products and environmental cases, the state has an interest in protecting its citizens from unjustly bearing the costs of an injury.

In sum, the policies underlying expanded successor liability in products cases have equal force in environmental harms cases. Thus, a true conflict does exist between states that recognize the modern exceptions and those that do not—even in the context of CERCLA.

2. Application of the Law of the State of Release

This true conflict will generally, under modern conflict of laws principles, be resolved in favor of application of the law of the state in which the hazardous release occurred rather than the law of the state in which the asset purchaser was incorporated.²³²

The most significant relationship approach first looks to the contacts between the states and the legal occurrence.²³³ This factor will generally favor the state of release for the following reasons. First, the injury (the release) occurs in that state, and, generally, the conduct causing the injury will occur in that state. Second, the injured parties—most especially the public—are located in the state of release. Finally, the “center” of the relationship between the asset purchaser and the injured parties is again the state of release. Conversely, the asset purchaser’s only contact with the state of incorporation is via incorporation.

Under both the most significant relationship and interest analysis approaches, the “quality” of these contacts is critically important. Both approaches involve an inquiry into the relevant policies of the conflicting jurisdictions to determine the relative degree of impairment of their interests.

First, if the state of incorporation recognizes broader exceptions to asset purchaser liability than the state of release, then the law of the latter should control. As noted above in the discussion about false conflicts, states generally adopt the broader exceptions to protect *their citizens* from unjustly bearing the cost of some harm simply because of

²³¹ See *supra* note 79 (highlighting the divergent interests of corporate planners and products liability plaintiffs with regards to successor liability).

²³² As described below, this holds true regardless of whether the state of hazardous release recognizes broader or narrower exceptions to successor liability than the state of incorporation.

²³³ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971).

corporate formalities. This interest will not be significantly impaired if *the citizens of another state* are forced—by application of a set of narrower exceptions—to bear such costs. Conversely, the state of release retains an interest in having its narrower successor liability laws consistently applied, even with respect to foreign corporations, to promote certainty for corporate planners and other business entities operating within its territory.

Similarly, if the state of incorporation recognizes narrower exceptions to asset purchaser liability than the state of release, the law of the state of release again should control. The state of incorporation has an important interest in this situation: the promotion of certainty for businesses incorporating under its law. However, the state of release also has an important stake in the application of its law. A “single CERCLA lawsuit may adjudicate the claims of a large number of actors,” including the citizens of the state of release and possibly even the state itself.²³⁴ Indeed, the comparative impairment test suggests use of the law of the state of release under these circumstances. The state of incorporation’s policy will be impaired only to the extent that its domestic corporations operate outside its territory. If its law was not applied, however, the state of release *would lose all control* over the adjudication of its citizens’ rights with respect to the allocation of costs (among the predecessor, successor, and injured parties) arising from environmental injuries.

Finally, the other factors identified by modern choice of law principles generally support the conclusion that the law of the state of release should govern CERCLA successor liability. A foreign corporation does not have a justified expectation that the law of its state of incorporation will govern its conduct with respect to external actors.²³⁵ Similarly, while CERCLA actions often will be brought in federal court, federal courts sitting within the state of release usually will be more familiar with that state law.²³⁶ This conclusion also implies certainty for corporate planners: the law of the state where the assets are

²³⁴ *Chrysler Corp. v. Ford Motor Co.*, 972 F. Supp. 1097, 1103 (E.D. Mich. 1997).

²³⁵ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d) (listing “the protection of justified expectations” as a factor “relevant to the choice of the applicable rule of law”). The internal affairs doctrine, which requires application of the law of the state of incorporation, is limited to matters of internal corporate governance. See *supra* note 198.

²³⁶ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(g) (listing “ease in the determination and application of the law to be applied” as another relevant factor in choice of law).

present will govern successor liability issues.²³⁷ Moreover, the basic policy of the exceptions to successor liability is the recognition that, at least under certain circumstances, adherence to corporate formalities may be unjust to injured third parties. This basic policy will be enhanced by allowing the state of release to provide the applicable legal rules in this context; it has the greatest incentive to protect the injured parties—its citizens.²³⁸

In summary, under modern conflict of laws principles, the law of the state in which the hazardous release occurred should govern CERCLA successor liability. However, that conclusion does not answer the more basic question of whether CERCLA should incorporate state law at all.

IV. CHOICE OF LAW TWO: APPLICATION OF *KIMBELL FOODS*

The state in which the hazardous release occurs should provide the rules of successor liability *if* the federal common law of CERCLA successor liability incorporates state law. Does it? Under *Kimbell Foods* and its progeny, the answer must be yes.

While several courts of appeals have reached this conclusion, neither side of the instant circuit split has adequately addressed the *Kimbell Foods* analysis. The circuits that have created federal rules to govern CERCLA successor liability have failed to heed Supreme Court precedents that require the existence of a significant conflict between federal policy and incorporation of state law.²³⁹ Conversely, the circuits that have (appropriately) incorporated state successor liability law have construed that law too inflexibly. These decisions rarely recognize the diversity of state law approaches; instead, they incorporate only the traditional exceptions, ignoring the successor liability principles actually recognized under state law.

Under *Kimbell Foods*, the federal courts may create a federal rule if the following factors are met: (1) the federal program “must be uni-

²³⁷ See *id.* § 6(2)(f) (listing “certainty, predictability and uniformity of result” as a relevant choice of law factor). Moreover, if the parties to a transaction dislike these rules, they may generally bargain for a choice of law provision with the asset sale contract. See *id.* § 187.

²³⁸ See *id.* § 6(2)(e) (listing “the basic policies underlying the particular field of law” as a relevant factor).

²³⁹ Note that the Supreme Court bears a large measure of responsibility for this confusion in light of its unexplained failure to apply the *Kimbell Foods* framework in *United States v. Bestfoods*, 524 U.S. 51 (1998). See *supra* Part II.B.2.

form in character throughout the Nation,"²⁴⁰ (2) "application of state law would frustrate specific objectives" of the federal program,²⁴¹ and (3) application of a federal rule would not "disrupt commercial relationships predicated on state law."²⁴² Supreme Court cases subsequent to *Kimbell Foods* have emphasized the second factor, arguing that the existence of a significant conflict between federal policy and state law is a precondition to the creation of federal common law to fill the gap in a federal statute.²⁴³

A. The "Lesser" *Kimbell Foods* Factors

Although there are valid arguments on both sides, ultimately neither considerations of national uniformity nor state law commercial relationships provide significant support for the creation of federal successor liability rules under CERCLA.

In *Kimbell Foods*, the Supreme Court "reject[ed] generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect administration of federal programs."²⁴⁴ The Court noted that the federal agency administering the loan programs at issue "assumes its security interests are controlled to a large extent by the commercial law of each State."²⁴⁵ Thus, the Court concluded that "the agencies' own operating practices belie their assertion that a federal rule . . . is needed to avoid the administrative burdens created by disparate state commercial rules."²⁴⁶

The instant situation is distinguishable. Most importantly, the EPA has, since 1984, argued that federal rules should govern CERCLA successor liability.²⁴⁷ Additionally, the EPA has argued that these federal rules should include the modern, expanded exceptions to asset

²⁴⁰ *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (internal quotation marks omitted) (quoting *United States v. Yazell*, 382 U.S. 341, 354 (1966)).

²⁴¹ *Id.*

²⁴² *Id.* at 729.

²⁴³ For a full discussion of *Kimbell Foods* and its progeny, see *supra* Part II.B.1.

²⁴⁴ 440 U.S. at 730.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 732.

²⁴⁷ See Schnapf, *supra* note 10, at 454 ("In 1984, however, the U.S. Environmental Protection Agency . . . announced that it would seek to impose liability on successor corporations."). The Department of Justice has not only adopted the EPA's position, but has also argued that the agency's position is entitled to *Chevron* deference. *Id.* at 454-55.

purchaser nonliability.²⁴⁸ According to the EPA, these expanded exceptions are consistent with, and would enhance the government's ability to further, the goals of CERCLA. Thus, unlike the agencies in *Kimbell Foods*, the EPA has not assumed that state law would govern CERCLA liability. Additionally, given the variation in state successor liability rules, EPA administrative costs would presumably be reduced through a uniform federal rule.²⁴⁹ Finally, state variation in successor liability rules suggests that the imposition of CERCLA liability on alleged corporate successors will vary by state. Arguably, that result conflicts with Congress's intent, embodied in CERCLA strict liability, to assure that hazardous waste contamination is effectively addressed by holding responsible parties accountable for cleanup costs across the country.

Despite these distinctions, there is no pressing need for nationally uniform successor liability rules under CERCLA. Anticipating the significant conflict analysis below, state successor liability law variation does not itself require creation of federal rules unless state law is contrary to the federal policy at issue. Moreover, EPA administrative costs may not be significantly higher if CERCLA incorporates state successor liability rules; regardless of the content of these rules, the primary administrative cost (in cases seeking to impose liability on asset purchasers) will result from factual investigations of the relationship between the CERCLA violator and the alleged successor. Finally, "fears that states will engage in a 'race to the bottom' in their effort to attract corporate business [are] groundless" because "[s]tates have a substantial interest in protecting their citizens and state resources."²⁵⁰

Similarly, state law commercial relationships do not strongly support the judicial creation of federal rules in this instance. In *Kimbell Foods*, the Supreme Court noted that "[i]n structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved."²⁵¹ That proposition is equally applicable to firms engaged in asset purchases—

²⁴⁸ See U.S. ENVTL. PROT. AGENCY, PRP SEARCH MANUAL 186-87 (2003) (describing the substantial continuity exception as applicable to CERCLA successor liability).

²⁴⁹ See, e.g., *United States v. Gen. Battery Corp.*, 423 F.3d 294, 301-02 (3d Cir. 2005) (noting the complexity of state successor liability law and arguing that this fact counsels against incorporation of state law).

²⁵⁰ *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring). Moreover, if states do engage in a race to the bottom, nothing prevents the courts from reevaluating, in light of these changed circumstances, their decision to incorporate state law rather than create federal common law.

²⁵¹ 440 U.S. at 739.

even if the law of the state in which the release occurred, rather than the state of incorporation, governs.²⁵² Corporate planners generally rely on state commercial law rules when structuring their transactions. Indeed, "the creation of federal common law in this area will create uncertainty in future commercial transactions," whereas "[s]tate corporate law . . . is well developed and easily discovered and applied."²⁵³

In summary, neither the concerns of national uniformity nor the *Kimbell Foods* factors involving state law commercial relationships strongly support creation of federal rules for CERCLA successor liability. As described below, the lack of a significant conflict between CERCLA policy and state successor liability rules also implies that creation of federal rules is inappropriate here.

B. Significant Conflict? Not Here

Supreme Court cases building on *Kimbell Foods* have emphasized the relationship between the federal policy and state law rules. Judicial creation of federal rules to fill statutory gaps is "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'"²⁵⁴ Indeed, "such a 'conflict' is normally a 'precondition'" for creation of a federal rule.²⁵⁵

There is no significant conflict between CERCLA policy and use of state successor liability law. Thus, the courts should incorporate the law of the state in which the hazardous release occurred to govern CERCLA successor liability. Importantly, the courts must be sensitive to variations in state successor liability rules; they should apply the rules of the state as they find them, rather than simply relying on "general" principles of corporate law.

As demonstrated in Part III, the state in which the hazardous release occurred should provide the successor liability rules (if state law is to govern). Again, the states may be grouped according to the relative stringency of their exceptions to asset purchaser nonliability. Delaware law recognizes the fewest exceptions, followed by a majority of the states that recognize the relatively narrow traditional exceptions; a minority of states recognize the modern exceptions and thus

²⁵² See *supra* Part III.C.2.

²⁵³ *Anspec Co.*, 922 F.2d at 1250 (Kennedy, J., concurring).

²⁵⁴ *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

²⁵⁵ *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *O'Melveny & Myers*, 512 U.S. at 87).

provide the most flexible successor liability rules.²⁵⁶ Despite these gradations, the successor liability law of no state significantly conflicts with federal (CERCLA) policy.

First, consider the states that recognize only the narrower (Delaware or traditional) exceptions. Arguably, if CERCLA successor liability is limited to these exceptions, some asset purchasers will escape CERCLA liability even though—in light of CERCLA strict liability—those entities have a sufficiently close connection to the (party that caused the) hazardous release to support liability.²⁵⁷ The argument is as follows. A primary purpose of CERCLA is to hold parties responsible for hazardous waste releases strictly liable for the cleanup cost of such contamination.²⁵⁸ Where the responsible party sells its business through an asset sale, it may be consistent with CERCLA's strict liability scheme to impose liability on the purchaser under some circumstances. For example, the de facto and mere continuation exceptions require continuity of ownership between the seller and purchaser. However, nothing in CERCLA's strict liability scheme, or the policies underlying it, suggests that continuity of ownership should be necessary to impose successor liability on the purchaser. But, if the state recognizes only the narrow exceptions, the asset purchaser may nonetheless escape liability.

This argument is facially appealing because it comports well with CERCLA's strict liability regime. But Congress placed limits on that strict liability scheme.²⁵⁹ Indeed, while recognizing that CERCLA imposes strict liability, an asset purchaser may have only an attenuated relationship to a hazardous waste release.²⁶⁰ Congress has amended CERCLA to take account of such attenuated relationships, and under appropriate circumstances, excuse otherwise liable parties from CERCLA.²⁶¹

²⁵⁶ See *supra* Part II.A.

²⁵⁷ See Schnapf, *supra* note 10, at 455 (noting that the Department of Justice supports expanded liability for asset purchasers because (1) CERCLA seeks to shift costs of hazardous waste releases from public to industry and (2) expansive liability would create incentives for asset purchasers to conduct comprehensive due diligence).

²⁵⁸ See Part I.A.

²⁵⁹ See *supra* note 25.

²⁶⁰ Cf. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 364 (9th Cir. 1998) (arguing that there is no evidence that application of state law will frustrate CERCLA's objective of holding "responsible" parties liable for hazardous waste releases).

²⁶¹ See 42 U.S.C. § 9607(r) (Supp. IV 2004) (providing that purchasers of contaminated property will not be liable under CERCLA as current owners or operators if such purchasers satisfy specified conditions).

More importantly, as Part II demonstrated, Congress recognized that it would not always be possible to identify the party responsible for hazardous waste releases. For this reason, Congress created the Superfund to publicly finance such cleanups. That is, if the applicable state law fails to impose liability on an asset purchaser (who would, say, be liable under a modern exception not recognized by the state), the Superfund would, as a last resort, pay for the cleanup. Thus, state successor liability rules that recognize only the traditional or Delaware exceptions do not significantly conflict with the federal policies embodied by CERCLA.

Finally, the traditional exceptions are equitable doctrines. Thus, courts should apply these exceptions as fairness requires.²⁶² Indeed, in the application of even the traditional exceptions to asset purchaser nonliability, many state courts have argued that the presence or absence of a single factor in the analysis should not be determinative.²⁶³ Federal courts, when incorporating state successor liability rules into CERCLA cases, should engage in this type of flexible analysis, at least when warranted by the doctrine of the particular state and the facts of the case.

Similarly, it should be even clearer that the use of state law recognizing the expanded modern exceptions to asset purchaser nonliability does not significantly conflict with CERCLA policies. The facial conflict present between CERCLA's strict liability scheme and the traditional exceptions is absent for the modern exceptions. Indeed, not even the EPA has sought to impose successor liability on an asset purchaser under a theory more expansive than the modern exceptions.

In summary, use of state successor liability law—whether it recognizes the modern and traditional exceptions or a narrower set of exceptions—does not significantly conflict with the federal policies embodied by CERCLA. This conclusion follows from the existence of multiple, sometimes conflicting goals within the statute.²⁶⁴ Balancing these goals admits a range of outcomes for successor liability under

²⁶² *North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 657 (7th Cir. 1998) (“[S]uccessor liability is an equitable doctrine that should not apply ‘unless justified by the facts.’” (quoting *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992))).

²⁶³ See *supra* note 65 and accompanying text (arguing that absence of specific elements of a *de facto* merger should not be fatal).

²⁶⁴ Most importantly, CERCLA contains a strict liability scheme that imposes liability on private responsible parties but also recognizes that a responsible party cannot always be identified—and therefore provides for public financing for cleanups of such sites.

CERCLA. None of the approaches to successor liability taken by the states significantly conflict with this permissible range. Thus, CERCLA should incorporate state law. Given the analysis of Part III, the law of the state in which the hazardous release occurred should govern CERCLA successor liability.

CONCLUSION

Notwithstanding inconsistent application of the doctrine by both the Supreme Court and the courts of appeals, *Kimbell Foods* remains the only principled framework for determining how the courts should fill the gaps in federal statutes. This framework suggests—as an increasing number of courts of appeals have recognized—that state law successor liability rules should be incorporated into the federal common law of CERCLA successor liability. And again, where the state of hazardous release and state of incorporation are different and possess conflicting successor liability rules, the law of the state of release should govern.

However, the federal courts must apply these state law successor liability rules as developed by the particular state supplying them. It is inconsistent with *Kimbell Foods* for a federal court to claim to incorporate state law to fill the gaps in a federal statute, and then subsequently treat that state law as equivalent to some notion of “fundamental” legal principles. Thus, for example, if a state recognizes the modern exceptions to asset purchaser nonliability, a federal court in a CERCLA successor liability case should carefully consider whether the state policies underlying those exceptions resonate with the goals of CERCLA. If so, and they usually will, the court should incorporate those rules into the CERCLA context.

Similarly, even the traditional exceptions to asset purchaser nonliability developed as *equitable rules* to protect injured third parties from unjustly bearing the costs of their injury simply because of the form of a corporate transaction. Given this context, many state courts apply these exceptions flexibly on a case-by-case basis as fairness warrants.²⁶⁵ In light of the commands of *Kimbell Foods* and its progeny, as well as the remedial goals of CERCLA, federal courts employing the law of those states should endeavor to do so as well.

²⁶⁵ See *supra* notes 58-59 and accompanying text.